No. 08-

IN THE

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

ALLISON COOPER, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an entity created by a State enjoys sovereign immunity under the Eleventh Amendment where the entity (i) is authorized by State statute to "exercise the public powers" of the State "as an agency and instrumentality thereof," (ii) is recognized by its enabling act and the State Supreme Court as enjoying sovereign immunity under State law, and (iii) is receiving substantial annual subsidies from the State to fund the entity's public mission?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Defendant-Appellant and Petitioner: Southeastern Pennsylvania Transportation Authority.

Plaintiff-Appellee and Respondent: Allison Cooper, on behalf of herself and all others similarly situated.

RULE 29.6 STATEMENT

Petitioner states that it has no parent companies and no publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Southeastern Pennsylvania Transportation Authority ("SEPTA") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on November 26, 2008.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 548 F.3d 296, and appears in the Appendix hereto at

pages 1a-34a. The District Court's opinion is reported at 474 F. Supp. 2d 720 (E.D. Pa. 2007), and appears in the Appendix hereto at pages 35a-50a.

JURISDICTION

The Court of Appeals issued its judgment on November 26, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

INTRODUCTION

The issue presented in this case is what deference federal law should accord a sovereign State in structuring and characterizing elements of state government. Where a sovereign State explicitly designates an agency it creates as a state agency entitled to sovereign immunity, provides substantial annual funding to the agency and exercises significant control over its affairs, a federal court should accord that designation substantial deference if federalism is to maintain its relevance. Yet the Third Circuit denied Eleventh Amendment immunity to just such an agency.

SEPTA's challenge to the Third Circuit's decision is particularly timely. Modern state governments are

besieged by the twin forces of increased demand for services and dwindling resources. States need the flexibility to create and structure state entities that will render government services more efficiently. And when they do so, States should have some degree of certainty that an express intent to cloak some of those entities in its own sovereignty will be honored. Unfortunately, the current state of Eleventh Amendment jurisprudence among the circuit courts provides little certainty. Even more troubling is the wide divergence of tests utilized by the circuits that make some States more sovereign than others. Thus, this case presents an ideal vehicle to provide guidance and uniformity with respect to a confusing yet fundamental aspect of sovereign immunity.

STATEMENT OF THE CASE

A. Facts

SEPTA is a Metropolitan Transportation Authority created by statute to operate a mass transit system within Philadelphia and its four contiguous counties. 74 Pa. C.S. §§ 1701-1785. SEPTA's enabling act provides that SEPTA "shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." *Id.* at § 1711(a). SEPTA's enabling act also explicitly provides that SEPTA is entitled to sovereign immunity. *Id.* at § 1711(c)(3).

SEPTA is not, and was not intended to be, self sufficient. It was purposefully structured by the Commonwealth so that its fare revenues would not cover its costs. When it was created, half of SEPTA's operating costs were to be funded by Commonwealth

and other governmental sources, with the other half generated by operating revenue. *See* Ct. App. J.A. 413.[1] The annual funding provided by the Commonwealth is not insignificant: SEPTA was scheduled to receive more than $625 million from Pennsylvania in fiscal year 2006 alone. Ct. App. J.A. 30.

Despite significant state subsidies, SEPTA's structural operating budget deficits have continued to increase. As a consequence, in the past several years, the Commonwealth has been forced three times to close SEPTA's budget gap through additional funding. Ct. App. J.A. 27, 28.

Increased Commonwealth funding has also led to increased Commonwealth control. *See* 74 Pa. C.S. § 1301, *et seq.* These controls include accounting and audit rights over SEPTA's operating and capital budgets together with periodic reviews by the Commonwealth of SEPTA's programs and services. *Id.* at §§ 1303, 1310-1315.[2] The Commonwealth also

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[1] "Ct. App. J.A." refers to the Appendix filed with the Court of Appeals.

[2] After briefing in the Third Circuit but before oral argument, Pennsylvania enacted Act 44, 74 Pa. Cons. Stat. §§ 1501-1520. Act 44 replaced the provisions contained in Chapter 13 of Title 74 (§§ 1301-1315) ("Act 26"). Under the repealed Act 26, Pennsylvania had determined the level of distribution for entities such as SEPTA. Under the new Act 44, Pennsylvania set a base amount to be distributed to such entities (in SEPTA's case $250 million) subject to increase upon request. The Circuit Court observed that Act 26 and Act 44 had increased Pennsylvania's "level of oversight" since Act 26's initial enactment in 1991. Pet. App. 29a.

severely limits SEPTA's ability to manage any operating deficit or to fund an adverse judgment. For example, SEPTA cannot generally raise fares or cut service without complying with a lengthy and costly public notice and hearing process. *Id.* at § 1741(a)(15).

B. Proceedings Below

1. Respondent Allison Cooper initiated this action seeking to represent two classes of SEPTA bus drivers whom she alleged had been denied overtime in violation of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA").[3] The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331.

SEPTA moved to dismiss the complaint on the ground that Cooper's FSLA claim was barred because SEPTA is an arm of the state entitled to sovereign immunity under the Eleventh Amendment. SEPTA's assertion of sovereign immunity was based, in large part, on the dignity interest of the Commonwealth of Pennsylvania. As SEPTA explained, sovereignty entails the States' right to govern themselves and to order their own affairs, including their ability to create, structure and characterize their own agencies. SEPTA contended that it would offend the Commonwealth's dignity interest to ignore an explicit designation that SEPTA is a state entity cloaked with the Commonwealth's sovereign immunity. SEPTA also

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[3] Plaintiff also asserted, but later abandoned, several state law causes of action.

pointed to the practical ramifications of a judgment. While the Commonwealth does not have legal liability for SEPTA's debts, SEPTA's structure, and recent history, demonstrate that the Commonwealth treasury would, as a practical matter, be impacted by an adverse judgment.

2. Because the Third Circuit had held in 1991 that SEPTA was not an arm of the state in *Bolden* v. *SEPTA*, 953 F.2d 807 (3rd Cir. 1991) (en banc), *cert. denied*, 504 U.S. 943 (1992), SEPTA explained how later precedents called that decision into serious question. The *Bolden* Court applied a three-part balancing test set forth in a previous opinion, *Fitchik* v. *New Jersey Transit Rail Operations*, 873 F.2d 655 (3d Cir.) (en banc), *cert. denied*, 493 U.S. 850 (1989). The three *Fitchik* factors were (1) state treasury (*i.e.*, how much funding came from the state); (2) status under state law (*i.e.*, how did the State itself treat the entity); and (3) autonomy (*i.e.*, how much independence from the State did the entity possess). The *Bolden* court, like *Fitchik*, declared that the state-treasury factor was "the 'most important'" of the three. *Bolden*, 953 F.2d at 818 (quoting *Fitchik*, 873 F.2d at 659). With that thumb on the scale, and because just over a quarter of SEPTA's funding came from the Commonwealth at that time, the *Bolden* court concluded that SEPTA was not entitled to sovereign immunity. 953 F.2d at 821. Two judges dissented and would have held that SEPTA was entitled to Eleventh Amendment immunity. *Id.* at 831-832 (Greenberg, J., dissenting, joined by Hutchinson, J.). Of particular importance to the

dissenters was SEPTA's unambiguous status under state law as a Commonwealth agency. *Id.* at 832.[4]

Eleventh Amendment jurisprudence has changed significantly since the split decision in *Bolden*. *See Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Regents of Univ. of Cal.* v. *Doe*, 519 U.S. 425 (1997); *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). This Court's subsequent opinions had made clear that the "preeminent purpose" of sovereign immunity is to protect the States' dignity interest as sovereigns. *Federal Maritime Comm'n*, 535 U.S. at 760. Further, *Hess* instructed that the critical first question in respecting the States' dignity is whether there was " 'good reason to believe' " that the agency had been structured by the State to enjoy the State's sovereign immunity. *Hess*, 513 U.S. at 43-47 (quoting *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979)). Here, the answer to that critical question was clear.

Material facts with respect to SEPTA had changed in the intervening years since *Bolden* as well. For example, the percentage of funding SEPTA received from the Commonwealth had increased from approximately 27% to 52% since 1991. In addition, the Commonwealth had been forced in the last three years to provide additional funding to close SEPTA's structural operating budget deficit. Finally, the

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[4] In *Fitchik* the Court of Appeals held that New Jersey Transit was not entitled to sovereign immunity. Five judges dissented and would have recognized sovereign immunity.

Commonwealth has increased its supervision over SEPTA since the decision in *Bolden*.

The District Court denied SEPTA's motion to dismiss utilizing the three factors developed in *Fitchik* and applied in *Bolden*. The District Court recognized that the Commonwealth treats SEPTA as a Commonwealth agency entitled to sovereign immunity. Nevertheless, the lower court found that because SEPTA also has a separate corporate existence and SEPTA can sue and be sued its status under state law only weighed "slightly" in favor of immunity. The District Court then mechanically applied the other two factors, concluding that SEPTA was not entitled to be treated as an arm of the state for purposes of Eleventh Amendment immunity. In doing so, the lower court relied primarily on the fact that the Commonwealth is not legally obligated to pay SEPTA's debts and that the Commonwealth appoints only a minority of SEPTA's directors.

SEPTA appealed the District Court's adverse immunity ruling to the U.S. Court of Appeals for the Third Circuit. SEPTA's interlocutory appeal was taken pursuant to 28 U.S.C. § 1291 and *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993) (order denying Eleventh Amendment immunity is immediately appealable under the collateral order doctrine). The Third Circuit affirmed. While the Third Circuit recognized that this Court's jurisprudence no longer permitted primary importance to be accorded the treasury factor, and that since 1991 SEPTA received a greater proportion of its funding from the Commonwealth and that the Commonwealth had

increased its control over SEPTA's operations, the Circuit Court, applying the same three *Fitchik* factors in substantially the same manner as the District Court, nevertheless concluded that SEPTA was not entitled to Eleventh Amendment immunity.

SEPTA petitions this Court for review of the Third Circuit's decision holding that an entity specifically structured as a state agency intended by the State to be cloaked with sovereign immunity and requiring substantial annual subsidiaries from the State to survive is not entitled to be treated as an arm of the state for purposes of Eleventh Amendment immunity.

REASONS FOR GRANTING THE WRIT

As this Court has recognized, core principles of federalism mandate that States be accorded the dignity inherent in their status as sovereigns. Fundamental to that status is the ability of the States to structure and order their own affairs. Indeed, our dual system wisely preserves the States' ability to govern as they deem fit, allowing the States to serve as "laborator[ies]" where they "remould, through experimentation, * * * economic practices and institutions to meet changing social and economic needs." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting); *see also Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 607-608 (1991). These tenets are reflected in the Eleventh Amendment and this Court's decisions thereunder.

The Third Circuit's holding is directly contrary to these fundamental principles. By mechanically

applying a multi-factor test, the Circuit Court improperly marginalized the specific intent of the sovereign in ordering its own affairs. Where, as here, a State explicitly structures an entity to be a state agency intended to be cloaked with the State's sovereign immunity, that structure should be accorded a high degree of deference if the State's dignity as a sovereign is to be respected.

Further, where the State has structured the entity so that it will require substantial annual subsidies from the State in order to survive, the Eleventh Amendment's purpose of protecting the state treasury is also implicated. The Circuit Court's narrow focus on ultimate legal liability improperly ignores the common sense reality of a judgment on an entity such as SEPTA.

The Third Circuit's holding is also directly at odds with multiple decisions of the Pennsylvania Supreme Court recognizing that SEPTA is a Commonwealth agency entitled to sovereign immunity. This Court has consistently recognized that cooperative judicial federalism requires that decisions of a State's highest court on issues of state law be treated with deference and represent the will of the sovereign. *See Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974); *Bush* v. *Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C. J., concurring).

The Circuit Court's ruling underscores a more widespread problem among the circuits. In an effort to separate arms of the state entitled to Eleventh Amendment immunity from local political subdivisions which are not, the circuit courts have

adopted tests employing a number of factors which vary from circuit to circuit. *See generally* Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray In The Eleventh Amendment Arm-Of-The-State Doctrine*, 92 Colum. L. Rev. 1243 (1992). The factors do overlap to some extent, however, the circuits are split as to which, if any, of the factors are entitled to more weight. Indeed, Justice O'Connor noted the problem in her dissent in *Hess*:

> The Court wisely recognizes that the six-factor test set forth in *Lake County*, *supra*, ostensibly a balancing scheme, provides meager guidance for lower courts when the factors point in different directions. Without any indication from this Court as to the weight to ascribe particular criteria, the Courts of Appeals have struggled, variously adding factors * * * distilling factors * * *, and deeming certain factors dispositive. [513 U.S. at 59 (O'Connor, J., dissenting) (internal citations omitted)].

Even though *Hess* attempted to provide some guidance,[5] the circuit court tests continue to vary widely. *See* Hector G. Blaudell, *Twins or Triplets?: Protecting The Eleventh Amendment Through A*

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[5] *Id.* at 47 (noting that when the factors point in different directions the inquiry should focus on the twin reasons for sovereign immunity: protecting the dignity and treasury of the State).

Three-Prong Arm-of-the-State Test, 105 Mich. L. Rev. 837, 844-845, 864 (2007) (outlining continued disarray among the circuits after *Hess*) (hereinafter "*Twins or Triplets*"). As a consequence, the application of the Eleventh Amendment differs from circuit to circuit.

This Court should grant certiorari to address the pivotal role of the States in structuring, construing and cloaking their own entities with their sovereign immunity and to provide needed uniformity in the application of the Eleventh Amendment.

I. THE THIRD CIRCUIT'S FORMALISTIC APPLICATION OF A MULTI-FACTOR TEST CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. The Court's Modern Eleventh Amendment Jurisprudence Emphasizes The Dignity Of The State As Sovereign While Not Ignoring The Practical Impact On The State Treasury Of A Judgment.

"Dual sovereignty is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n*, 535 U.S. at 751. This federalist principle, "requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden* v. *Maine*, 527 U.S. 706, 748 (1999). Consequently, States retain "a residuary and inviolable sovereignty" and are "not relegated to the role of mere provinces or political corporations, but

retain the dignity, though not the full authority, of sovereignty." *Id.* at 715 (internal citation omitted).

An integral component of the States' "residuary and inviolable sovereignty * * * is their immunity from private suits." *Federal Maritime Comm'n*, 535 U.S. at 751-752 (citations omitted). Indeed, this Court has explicitly recognized that "the preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Id.* at 760.

A State's immunity from suit is reflected, in part, in the Eleventh Amendment. Sovereign immunity under the Eleventh Amendment also extends to "certain actions against state agents and state instrumentalities" as well as to the States themselves. *Doe*, 519 U.S. at 429.[6] On the other hand, this Court "has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" *Lake County Estates*, 440 U.S. at 401 (*citing Mt. Healthy City Sch. Dist. Bd. of Ed.* v. *Doyle*, 429 U.S. 274 (1977)).

The Court's modern jurisprudence under the Eleventh Amendment starts with the *Mt. Healthy* case. *Mt. Healthy* involved a local school board. Noting that the Eleventh Amendment does not extend to municipal corporations or other political

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[6] This Court has expressly held that a State's sovereign immunity under the Eleventh Amendment precludes an action under the FLSA. *Alden*, 527 U.S. at 759.

subdivisions, this Court necessarily focused first on the "nature of the entity created by state law." 429 U.S. at 280. Concluding that state law rendered the school board in questions more like a county or city than an arm of the state, this Court held the Eleventh Amendment did not apply.[7] *Id.* at 280-281.

Two years later, in *Lake County Estates*, this Court considered whether an agency formed through a bi-state compact between California and Nevada was entitled to sovereign immunity. Focusing first on the sovereign's intent, this Court noted that "[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose," there would be no justification to extending sovereign immunity to that agency. 440 U.S. at 401. Significantly, both States disclaimed any intent to confer immunity. *Id.*

Additionally, certain non-exclusive factors germaine to the arm-of-the-state analysis were identified, including how the agency is characterized under state law, the level of control exercised by the State, the entity's relationship to the public treasury—both the size of the State's subsidy and whether the State is legally liable for the entity's debts—and whether the entity performs a state function. *Id.* at 401-402. Given the intention of the founding States, together with the terms of the

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[7] A number of additional factors were considered, such as the level of guidance and funding from the State and whether the school board had revenue raising power. *Id.*

compact and the actual operations of the agency, this Court concluded that Eleventh Amendment immunity did not apply. *Id.* at 402.

In 1994, the Court again addressed the application of the Eleventh Amendment to a bi-state agency in *Hess*.[8] After noting that the initial adoption of the Eleventh Amendment was in response to the States' fear that federal courts would force them to pay their Revolutionary War debts, this Court observed that "[m]ore pervasively, current Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system * * *." 513 U.S. at 39 (internal citations omitted). In order to respect that integrity, the Court asked the question posed earlier in *Lake Country Estates*: whether there was "good reason to believe" that the agency had been structured by the States "to enjoy Eleventh Amendment immunity." *Id.* at 47.

As to the potential financial impact of a judgment on the States, *Hess* observed that the authority was entirely self sufficient and financially independent of its founding States. In fact, this Court specifically contrasted the situation in *Hess* with that of "an interstate transit system whose revenue shortfall Congress and the cooperating States anticipated from the start, an enterprise constantly dependent on funds from the participating governments to meet its sizable operating deficits." *Id.* at 49-50.

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[8] The logic and teachings of *Hess* were not available to the Third Circuit when it decided *Bolden* in 1991.

In sum, while looking to a number of factors in making the arm-of-the-state determination in *Hess*, the Court was guided by the twin reasons for the Eleventh Amendment: protecting against threats to the States' dignity interest as well as the effect of a judgment on the state treasury. *Id.* at 47.

Cases after *Hess* have further clarified the application of the Eleventh Amendment. For example, in 1997, this Court acknowledged that sovereign immunity may be found even when the judgment has no potential impact on the state treasury. *Doe*, 519 U.S. at 429. In *Doe*, any potential judgment would have been paid out of federal funds, however, this Court reiterated that the proper focus on the arm of the state inquiry is "the relationship between the State and the entity in question * * * and the 'nature of the entity created by state law.'" *Id.* (emphasis added and internal citations omitted).

Finally, in 2002, this Court explicitly recognized that the preeminent purpose of sovereign immunity is to accord the States the dignity they are entitled to as sovereign. *Federal Maritime Comm'n*, 535 U.S. at 760; *see also id.* at 765 ("While state sovereign immunity serves the important function of shielding state treasuries and thus preserving 'the States' ability to govern in accordance with the will of the citizens' * * *, the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns.") (internal quotation marks and citations omitted). Thus, this Court's recent arm of the state cases have stressed the importance of protecting a State's dignity interest while also shielding the

State's treasury from the practical impact of a judgment. While a number of factors in determining ambiguous cases are utilized, these factors were never intended to be divorced from the twin purposes of the Eleventh Amendment.

The Third Circuit's sovereign-immunity jurisprudence has not evolved with similar alacrity. In denying SEPTA sovereign immunity under the Eleventh Amendment, the Third Circuit largely focused on a formalistic inquiry into financial liability. Its focus runs afoul of the reasoning and logic employed in *Hess* and the later cases from this Court described above.

Hess applied the "state treasury" factor to a bi-state transit agency. But in doing so, *Hess* did not focus solely on legal liability. Rather, the Court focused on the importance of both the practical and the legal effects of a potential judgment on the state treasuries. 513 U.S. at 51. *See also Doe*, 519 U.S. at 430. More specifically, *Hess* found it highly significant that the bi-state authority was, and always had been, financially independent from its founding states. Indeed, *Hess* specifically contrasted that situation with a transit agency entitled to Eleventh Amendment immunity because its "revenue shortfall Congress and the cooperating States anticipated from the start, an enterprise constantly dependent on funds from the participating governments to meet its sizable operating deficits." *Id.* at 49-50.

Just so here. SEPTA was structured from the start to require massive governmental subsidiaries to

meet its operating deficits. The Commonwealth also has had to continually provide significant additional funding to close SEPTA's structural deficit. Yet the Third Circuit essentially concluded that ultimate legal liability was all that mattered. Pet. App. 18a. In electing to focus on that issue essentially to the exclusion of the broader question of the Commonwealth's intent, the Court of Appeals, as a practical matter, has exposed the Commonwealth's treasury to a judgment against the express will of the sovereign.

The Third Circuit's formalistic application of a list of factors ignores this Court's teachings. As *Hess* recognized, the crucial initial question is whether the sovereign structured the entity with the expectation that immunity applied. Here, the answer to that question is crystal clear. The Third Circuit's approach, however, improperly marginalizes the sovereign's stated relationship with its own agency. Further, by focusing on ultimate legal liability, the Third Circuit improperly ignores the practical reality of a judgment against SEPTA on the Commonwealth's treasury. In short, the Third Circuit's approach demonstrates the danger of conducting an arm-of-the-state analysis divorced from the twin purposes of the Eleventh Amendment.

B. The Third Circuit's Approach Conflicts With The Decisions Of The Pennsylvania Supreme Court, Further Undermining Fundamental Principles Of Sovereignty.

Multiple decisions of the Pennsylvania Supreme Court recognize SEPTA's status as a Commonwealth agency entitled to sovereign immunity. *See Jones* v. *SEPTA*, 772 A.2d 435 (Pa. 2001); *Tulewicz* v. *SEPTA*, 606 A.2d 427 (Pa. 1992); *Feingold* v. *SEPTA*, 517 A.2d 1270 (Pa. 1986). As explained in *Doe*, the arm-of-the-state inquiry should focus on "the relationship between the State and the entity in question * * * and the nature of the entity created by state law." 519 U.S. at 429. Here, the pronouncements of Pennsylvania's highest court should have been treated as definitive.

This Court has long emphasized the importance of respecting state courts on issues of state law. In fact, "[i]n most cases, comity and respect for federalism compel [the Court] to defer to the decisions of state courts on issues of state law. That practice reflects [the Court's] understanding that decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush* v. *Gore*, 531 U.S. at 112 (Rehnquist, C. J., concurring). As Justice Ginsburg explained in dissent: "This principle reflects the core of federalism, on which we all agree. 'The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.' " *Id.* at

142 (*quoting Saenz* v. *Roe*, 526 U.S. 489, 504 n.17 (1999)).

These principles are not abandoned simply because the application of the Eleventh Amendment is an issue of federal law. As an initial matter, although Eleventh Amendment immunity is a question of federal law, "that federal question can be answered only after considering the provisions of state law that define the agency's character." *Doe*, 519 U.S. at 429 n.5. Moreover, as explained in *Bush*:

> No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court. [531 U.S. at 137 (Ginsburg, J., dissenting)].

By deferring to state courts on issues of state law, the Court reinforces its "commitment to 'build[ing] cooperative judicial federalism.' " *Id.* at 139 (*quoting Lehman Brothers*, 416 U.S. at 391).

More fundamentally, "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 612 (1937). Indeed, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State

defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Here, Pennsylvania has structured itself so that SEPTA is an agency of the Commonwealth entitled to sovereign immunity. This structure is part of how Pennsylvania defines itself as a sovereign. Under this Court's Eleventh Amendment jurisprudence, the dignity of the sovereign—including its prerogative to distribute power among its own governmental organs—is preeminent. *Federal Maritime Comm'n*, 535 U.S. at 760. The Third Circuit's conclusion that the sovereign's explicit characterization that SEPTA is a Commonwealth agency entitled to sovereign immunity only weighs "slightly" in favor of Eleventh Amendment immunity clearly violates these fundamental teachings.[9]

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[9] The fatal flaw in the Third Circuit's approach is apparent when the situation is examined from the converse. For example, if a State were to explicitly declare that a particular entity created by the State was not intended to share sovereign immunity and that declaration was affirmed multiple times by the State's highest court, could a federal court nevertheless declare that the entity was an arm of the state entitled to Eleventh Amendment immunity? *See Fresenius Med. Care Cardiovascular Res., Inc.* v. *Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63 (1st Cir.), *cert. denied*, 540 U.S. 858 (2003) ("Not all entities created by states are meant to share state sovereignty. * * * A state may not have intended for example, that the employees of the entity may be unable to privately enforce the Fair Labor Standards Act. * * * An erroneous arm-of-the-state decision may frustrate, not advance, a state's dignity and its interests.").

II. THE THIRD CIRCUIT'S RULING UNDERSCORES A CONFLICT AMONG THE CIRCUITS IN THEIR APPROACH TO DETERMINING WHETHER AN ENTITY IS AN ARM OF THE STATE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

The courts of appeals regularly are called upon to determine if a particular entity is an arm of the state entitled to Eleventh Amendment immunity. But the approach each court of appeals takes in that analysis has historically been anything but uniform. As Justice O'Connor noted in *Hess*, "the Courts of Appeals have struggled" with the sovereign-immunity inquiry, "variously adding factors * * *, distilling factors * * *, and deeming certain factors dispositive." 513 U.S. at 59 (O'Connor, J., dissenting) (internal citations omitted). While *Hess* attempted to provide some guidance on the issue, the courts of appeals continue to struggle with the test, its formulation, and its application, such that results of an Eleventh Amendment inquiry are likely to differ from circuit to circuit. *See Twins or Triplets*, 105 Mich. L. Rev. at 844-845. The courts of appeal use a number of different tests, employ a variety of different factors, and disagree as to which, if any, of the factors should be weighed most heavily in the inquiry—all of which makes for a muddled set of precedents. *Id.*

First, the factors themselves vary in number and type. The First Circuit utilizes a two-step analysis,[10]

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[10] *See Fresenius Med.*, 322 F.3d at 68 (two key questions with many factors instructive on each).

the Third, Eighth and Eleventh Circuits employ three factors,[11] the Fourth, Sixth and Tenth Circuits look to four factors,[12] the Ninth Circuit examines five factors[13] and the Second, Fifth and Seventh Circuits review six factors.[14] These factors do overlap to some extent, but the tests vary to a substantial degree. For example, the Second, Fourth, Fifth, Ninth and Tenth Circuits all examine whether the entity's function is primarily local or more central to the

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[11] The Third Circuit applied three factors in this case. *See also Thomas* v. *St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006) (looking at three factors); *Vierling* v. *Celebrity Cruises, Inc.*, 339 F.3d 1309, 1314 (11th Cir. 2003) (recognizing three factor test).

[12] *See Cash* v. *Granville Cnty Bd. of Ed.*, 242 F.3d 219, 223-224 (4th Cir. 2001) (noting Fourth Circuit has developed a four-part test); *S.J.* v. *Hamilton Cnty., Ohio*, 374 F.3d 416, 420 (6th Cir. 2004) (noting four general factors); *Steadfast Ins. Co.* v. *Agricultural Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007) (looking to four primary factors).

[13] *Savage* v. *Glendale Union High Sch.*, 343 F.3d 1036, 1040 (9th Cir. 2003) (identifying five factors).

[14] *See Woods* v. *Rondout Valley Cent. Sch.*, 466 F.3d 232, 240-241, 243 (2d Cir. 2006) (noting Court initially considers six factors and if all point in one direction inquiry complete; if not Court focuses on twin reasons for Eleventh Amendment); *Black* v. *North Panola Sch. Dist.*, 461 F.3d 584, 596 (5th Cir. 2006) (noting that Court should examine six factors); *Keri* v. *Bd. of Trustees of Purdue Univ.*, 458 F.3d 620, 641 (7th Cir. 2006) (identifying six factors), *cert. denied*, 549 U.S. 1210 (2007). The Seventh Circuit's approach could also be characterized as a two-part test with the first inquiry consisting of five subparts. *See Peirick* v. *Indiana Univ.-Purdue Univ./Indianapolis Athletics Dep't*, 510 F.3d 681, 695 (7th Cir. 2007).

state[15] while the Third Circuit does not even consider that factor relevant. Had this factor been included, the calculus may well have been altered: SEPTA's enabling act explicitly provides that SEPTA "shall in no way be deemed to be an instrumentality of any city or county or other municipality or engaged in the performance of a municipal function, but shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." 74 Pa. C.S. at § 1711(a).

Perhaps more importantly, the circuits differ over the relevant *weight* to be accorded the various factors. For example, the First Circuit follows the teaching of this Court in *Hess*, asking first whether the State clearly structured the entity to share its sovereignty. *Fresenius Med.*, 322 F.3d at 68. As the First Circuit recognizes, this initial inquiry pays deference to the State's dignity interest, but if the answer to the inquiry is ambiguous, then the dispositive question is whether damages will be paid from the state treasury. *Id.* at 65-68. The Second Circuit utilizes a similar—albeit more complicated—tiered test. *See Woods*, 466 F.3d at 240-41. The approach followed by the First Circuit would likely have led to different result here. Both the

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[15] *See Woods*, 466 F.3d at 245-246 (looking to whether the entity's function is traditionally one of local or state concern); *Cash*, 242 F.3d at 226 (examining whether the scope of the agency's concern is local or statewide); *Black*, 461 F.3d at 597 (same); *Savage*, 343 F.3d at 1044-45 (determining whether the entity performs central government function); *Steadfast Ins.*, 507 F.3d at 1255-56 (asking whether entity in question is concerned primarily with local or state affairs).

Pennsylvania Legislature and the Pennsylvania Supreme Court have made clear that SEPTA was structured by the Commonwealth to share its sovereign immunity.

Other Circuits, however, still place primary emphasis on the state treasury factor. This is the approach taken by the Fourth, Fifth, Sixth, Seventh and Ninth Circuits.[16] Even these Circuits, however, differ in the details. For example, the Seventh Circuit places considerable emphasis on the practical impact on the state treasury of a judgment whereas the Third Circuit focused here on actual legal liability. Compare *Peirick*, 510 F.3d at 695-696 (noting the entity's financial autonomy from the state is determined using a five-part test: "(1) the extent of state funding; (2) the State's oversight and control of the entity's fiscal affairs; (3) the entity's ability to raise funds; (4) whether the entity is subject to state taxation; and (5) whether a judgment against the entity would result in an increase in its

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[16] *See Cash*, 242 F.3d at 223 (assigning primary importance to state treasury factor); *Black*, 461 F.3d at 596 ("In light of the fundamental purpose of the Eleventh Amendment—protecting state treasuries—the source of the entity's funding is given the most weight."); *Perry* v. *Southeastern Boll Weevil Eradication Found., Inc.*, 154 Fed. Appx. 467, 472 (6th Cir. 2005) (noting that the State's obligation to pay the judgment is the most important factor in its balancing test); *Peirick*, 510 F.3d at 695 (holding that "[i]n deciding whether an entity is an agency of the state, the most important factor is the extent of the entity's financial autonomy from the state.") (internal quotation and citations omitted); *Savage*, 343 F.3d at 1040-41 (whether a money judgment would be satisfied out of state funds is most important factor).

appropriations") *with* Pet. App. 17a ("the key factor in our assessment of the state treasury prong is the potential legal liability of the Commonwealth for SEPTA's debts") (internal citations omitted).

The Seventh Circuit's pragmatic approach plainly would favor SEPTA far more than the Third Circuit's formalistic one did. SEPTA receives hundreds of millions of dollars from the Commonwealth, the Commonwealth has substantial control over SEPTA's affairs—including its ability to raise fares or cut services—SEPTA is not generally subject to state taxation and the Commonwealth has had to increase SEPTA's appropriation in each of the last three years to close SEPTA's structural operating deficit. Under the Seventh Circuit's approach, SEPTA likely would have been deemed a state entity. Under the Third Circuit's, SEPTA was not.

The Third Circuit has essentially established its own unique approach to sovereign immunity jurisprudence. That approach examines three factors in what amounts to a formalistic balancing inquiry. The first two factors—the state treasury and status under state law—are given the same weight as the third factor—autonomy—despite the fact that *Hess* instructs that the first two factors should be the Court's primary guide and *Federal Maritime Commission* explains that the preeminent purpose of sovereign immunity is to respect the dignity of the States. Further, in analyzing the state treasury factor, the Third Circuit minimizes the practical impact of a judgment on the state treasury by focusing almost exclusively on legal liability. Finally, with respect to the entity's status under

state law, the Third Circuit improperly marginalizes the sovereign's explicit intent in structuring its own agencies by relying on a number of subfactors rather than multiple decisions of the Pennsylvania Supreme Court and SEPTA's enabling act which designate SEPTA as a Commonwealth agency entitled to sovereign immunity.

When SEPTA's characteristics are run through the various Circuit Court tests, its status as an arm of the state is sure to vary. Dual sovereignty, however, is a defining feature of our government. The ability of Massachusetts to structure its own entities and cloak them with its sovereign immunity should be no greater or lesser than Pennsylvania. The practical impact on a State's treasury of a judgment against a state created entity should not matter more in Illinois than in Pennsylvania. A more principled and uniform approach than this is required.

III. THE CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT AND RECURRING QUESTION.

This case squarely presents a fundamental issue that goes to the core of our federalist system and the States' ability to govern. The issue was fully briefed, argued and resolved by the lower courts on a straightforward factual record and is ripe for this Court's review. Moreover, the question is recurring. Modern demands on state government make resolution of the issue timely. As States attempt to more efficiently govern in an era of increased demand and shrinking resources, the need to create hybrid state entities that are partially self-sufficient

and cloak those entities with sovereign immunity will only increase. Consequently, resolution of the issue by this Court will provide guidance and needed uniformity to the lower courts that such a fundamental right deserves. *See Twins or Triplets*, 105 Mich. L. Rev. at 863-864 (noting the need for guidance and uniformity in deciding Eleventh Amendment immunity).

In the years since Justice O'Connor observed that the courts of appeals have "struggled" with the issue of sovereign immunity, *Hess*, 513 U.S. at 59 (O'Connor, J., dissenting), other commentators similarly have observed that the lower court's sovereign immunity jurisprudence is hopelessly confused. *See Twins or Triplets*, 105 Mich. L. Rev. at 844 ("Even after *Hess*, the arm-of-the-state doctrine is confusing and difficult to apply."); *Mancuso* v. *N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996) ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused."); *Gray* v. *Laws*, 51 F.3d 426, 431 (4th Cir. 1995) (characterizing *Hess* as "an opinion that is certain to generate confusion"). Because this case presents an ideal opportunity to resolve an important immunity issue for the benefit not only of SEPTA, but state-created entities across the Nation, this Court should grant the Writ.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-1522

[Filed November 26, 2008]

ALLISON COOPER, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED	)
v.	)
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Appellant	)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 06-cv-0888
(Honorable Thomas M. Golden)

Argued March 4, 2008

Before: SCIRICA, *Chief Judge*,
FISHER and ROTH, *Circuit Judges*.

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OPINION OF THE COURT

SCIRICA, *Chief Judge*.

At issue is whether the Southeastern Pennsylvania Transportation Authority ("SEPTA") is entitled to sovereign immunity under the Eleventh Amendment. In 1991, we determined SEPTA was not an arm of the state. *Bolden v. SEPTA*, 953 F.2d 807 (3d Cir. 1991) (en banc), *cert. denied*, 504 U.S. 943 (1992). Now SEPTA contends that subsequent changes in Eleventh Amendment jurisprudence and in SEPTA's state funding formula demand reconsideration and entitle it to sovereign immunity. The District Court disagreed. We will affirm.

Plaintiff Allison Cooper, a bus driver for SEPTA, brought a collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(a). She contends SEPTA undercompensates its bus drivers by failing to fully account for their performance of required pre-trip safety inspections. SEPTA filed a motion to dismiss citing the Eleventh Amendment bar of sovereign immunity. After allowing discovery on SEPTA's funding, the District Court construed the motion as one for summary judgment and denied it. SEPTA appealed.

I.

SEPTA, a metropolitan transportation authority created by the Commonwealth of Pennsylvania,[1] operates a mass-transit system within Philadelphia and its surrounding counties, as well as points in New Jersey. The pay period for SEPTA's bus drivers commences ten minutes before the bus is scheduled to pull out of the depot in the morning. Those who drive a "swing run" – two shifts a day, with a break in between – are compensated for the second shift commencing at the time of the scheduled pull-out in the afternoon. The bus drivers must perform a safety inspection before any departure, whether in the morning or afternoon. According to Cooper, these inspections take ten to thirty minutes to complete.

Cooper filed this collective action, bringing claims under the FLSA, 29 U.S.C. § 207(a), as well as under state law.[2] She contended SEPTA deprived its bus

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[1] *See* 74 Pa. Cons. Stat. §§ 1701–1785.

[2] Count 1 asserted "SEPTA has willfully and intentionally engaged in ongoing and knowing violations of the overtime provisions of the FLSA by requiring plaintiff and all others similarly situated to conduct pre-trip inspections before their runs, but not paying them for all time worked performing the pre-trip inspections, and not counting the inspection time for purposes of calculating overtime." Compl. ¶ 40. Count 1 was brought as a collective action on behalf of "those bus drivers who, without factoring in the time spent performing pre-trip inspection, were already working at least 40 hours a week." *Id.* ¶ 38. Count 2 set forth two classes – a "swing shift class" and a "morning pre-trip class" – and contended SEPTA's conduct was prescribed by state statute and breached its collective bargaining agreement. Counts 3-5 adopted these two classes and asserted various other

drivers of compensation by paying them for only a portion of the time it took to perform morning inspections and by failing to pay them at all for inspections before the second shift of a swing run. Proceedings in the District Court were stayed pending the outcome of this appeal.[3]

II.

The District Court had jurisdiction under 28 U.S.C. § 1331. An order denying Eleventh Amendment immunity is immediately appealable as a final order under the collateral order doctrine. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993). Accordingly, we have jurisdiction under

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claims under state law.

Subsequent to filing her complaint, Cooper "narrowed her lawsuit to a single claim and now asserts a single class, brought under the FLSA. The class consists of all SEPTA 'swing run' bus drivers (defined as all drivers who work two shifts in a day, with lengths of varying breaks between their runs) who work at least 40 hours a week but who are not paid for their required afternoon under vehicle inspections." Cooper's Mem. in Support of Motion to Certify 4.

[3] On July 18, 2007, after briefing but before oral argument, the General Assembly enacted Act 44, 74 Pa. Cons. Stat. §§ 1501–1520. Act 44 replaced the provisions contained in Chapter 13 of Title 74 (§§ 1301–1315), which pertained to "Public Transportation Assistance" and (with the exception of § 1315) were enacted as part of Act 26 of 1991 ("Act 26"). As discussed *infra*, Act 26's provisions created a dedicated source of funding for public transportation throughout the state and imposed certain requirements on the entities applying for this funding. Act 44 repealed the provisions in Chapter 13, implemented a new source of funding, and established a new financing scheme for entities applying for and receiving funding.

28 U.S.C. § 1291. Our review of a denial of summary judgment is plenary. *Hampe v. Butler*, 364 F.3d 90, 93 (3d Cir. 2004). "The party asserting immunity bears the burden of production and persuasion." *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 229 (3d Cir. 2006).

III.

Since our decision in *Bolden*, the Supreme Court has refined its Eleventh Amendment jurisprudence. We have followed suit. SEPTA contends these changes have wrought a "fundamental shift in emphasis," so that a state's characterization of an agency as an arm of the state is essentially dispositive. SEPTA's Reply Br. 8. We have modified our own jurisprudence to reflect direction from the Supreme Court, but we have not concluded that a state's characterization warrants dispositive treatment in our sovereign immunity analysis.

A brief review of *Bolden* and subsequent case law is in order. In *Bolden*, we addressed en banc whether SEPTA was entitled to sovereign immunity. We applied the test set forth in our analysis of New Jersey Transit's claim of immunity in *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir. 1989) (en banc). This test determines whether an agency is entitled to sovereign immunity by balancing three factors: (1) state treasury, (2) status under state law, and (3) autonomy.[4] Noting that the state-treasury

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[4] In *Urbano v. Board of Managers of the New Jersey State Prison*, we identified nine factors to consider when determining whether an entity is the "alter ego" of the state, and thus entitled to sovereign immunity. 415 F.2d 247, 250-51 (3d Cir. 1969). In *Fitchik*, we realigned the *Urbano* factors into three larger

factor was "the 'most important'" of the three, *Bolden*, 953 F.2d at 818 (quoting *Fitchik*, 873 F.2d at 659), we first addressed the Commonwealth's funding of SEPTA. With "only about 27% of its revenue [coming] from the state government," SEPTA did not derive its funding primarily from the Commonwealth. *Id.* at 819. "[T]his most important fact" weighed heavily against a finding of immunity. *Id.* Furthermore, the Commonwealth was shielded from liability for SEPTA's obligations. *Id.* Nor was SEPTA required to request funds from the Commonwealth to pay for adverse judgments because it could raise revenues by increasing fares. *Id.* And even though SEPTA contended it might not be able to meet a significant shortfall by raising fares and would be forced to rely on increased state subsidies, we rejected that argument.

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questions, while eliminating one of the nine factors – "whether the agency exercises a governmental or proprietary function" – because it was no longer relevant in light of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *Fitchik*, 873 F.2d at 659 & n.2. The three "*Fitchik* factors" are:

> (1) Whether the money that would pay the judgment would come from the state (this includes three of the *Urbano* factors – whether payment will come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);
>
> (2) The status of the agency under state law (this includes four factors – how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and
>
> (3) What degree of autonomy the agency has.

Id. at 659. We stipulated that "[a]lthough no single *Urbano* factor is dispositive, the most important is whether any judgment would be paid from the state treasury." *Id.*

We found "discretionary subsidies committed in reaction to a judgment . . . would not necessarily transform the recipients into alter egos of the state." *Id.* Given this funding relationship between SEPTA and the Commonwealth, we found the state-treasury factor "weigh[ed] at least as strongly against SEPTA's Eleventh Amendment argument as it did against New Jersey Transit's argument in *Fitchik*." *Id.* at 820.[5]

We then considered the second factor – SEPTA's status under state law. We found some of SEPTA's attributes were not characteristic of an arm of the state: it had (1) a "separate corporate existence," (2) "the power to sue and be sued," and (3) "the power to enter into contracts and make purchases on [its] own behalf." *Id.* But we also found attributes of SEPTA that were characteristic of an arm of the state: (1) it was "exempt[] from state property taxation," (2) it possessed "certain public powers such as the power of eminent domain," and (3) it was "subject to the Pennsylvania Sovereign Immunity statute." *Id.* SEPTA shared all of these attributes with New Jersey Transit. We noted "SEPTA differ[ed] from [New Jersey Transit] in that SEPTA [was] proclaimed by statute to be 'an agency and instrumentality' of the Commonwealth, but this same provision also describe[d] SEPTA as a 'separate body corporate and public.'" *Id.* (quoting 55

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[5] SEPTA also relied on Act 26, which created a "Public Transportation Assistance Fund" that provided for the Commonwealth to make an annual appropriation to meet certain public transportation needs. *Bolden*, 953 F.2d at 819 (citing Act 26, 74 Pa. Cons. Stat. §§ 1302(2)(iii) & (3), 1303(a) (repealed 2007), § 1314 (repealed 1994)). Because Act 26 had just been enacted, we found its impact "too uncertain to be given significant weight" in our determination. *Id.* at 819-20.

Pa. Cons. Stat. Ann. § 600.303(a) (West 1991) (repealed 1991); Act 26, 74 Pa. Cons. Stat. § 1502 (repealed 1994)). Thus, we found SEPTA's status under state law, like that of New Jersey Transit in *Fitchik*, weighed only "'slightly' in favor" of sovereign immunity. *Id.*

Third, we considered SEPTA's degree of autonomy from the Commonwealth. Although in *Fitchik* this factor weighed slightly in favor of according New Jersey Transit immunity, we found SEPTA enjoyed more autonomy than New Jersey Transit. SEPTA possessed powers similar to New Jersey Transit's, which gave the entities "a measure of autonomy." *Id.* These powers included "the exclusive power to initiate action and the power 'to enter contracts, bring lawsuits, purchase and sell property, buy insurance, structure the corporation's internal management, and set and collect fares.'" *Id.* (quoting *Fitchik*, 873 F.2d at 663). Only five of SEPTA's fifteen board members were appointed by state officials, with the other ten appointed by the counties SEPTA served, whereas three of New Jersey Transit's seven board members were (by statute) members of the state's executive branch. *Id.* Significantly, New Jersey's Governor could veto the actions of New Jersey Transit's board, but SEPTA was not subject to the Commonwealth's gubernatorial veto. *Id.* Because SEPTA had greater control over its own actions, we found "the autonomy factor, which weighed 'slightly' in [New Jersey Transit's] favor, is appreciably weaker here." *Id.*

We considered these three factors, treating the state-treasury factor as the most important. *Id.* at 821. Finding SEPTA's argument for immunity weaker than New Jersey Transit's, we held SEPTA, like New Jersey

Transit, was not entitled to Eleventh Amendment protection. *Id.*

Supreme Court jurisprudence since *Bolden* has prompted us to alter our sovereign immunity analysis. In *Hess v. Port Authority Trans-Hudson Corp.*, the Court held PATH, a subsidiary of the Port Authority, was not an arm of the state entitled to sovereign immunity. 513 U.S. 30, 52-53 (1994). In its analysis, the Court recognized "the States' solvency and dignity" as "the concerns . . . that underpin the Eleventh Amendment." *Id.* at 52; *see also id.* at 47 (describing these concerns as "the Eleventh Amendment's twin reasons for being"). Drawing on *Hess*, the Court in *Regents of the University of California v. Doe* found the University of California retained sovereign immunity despite the federal government's agreement to indemnify it against costs of litigation, including adverse judgments. 519 U.S. 425, 431 (1997). The Court clarified that, when assessing whether an entity is an arm of the state, "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." *Id.*; *see also id.* (refusing "to convert the inquiry into a formalistic question of ultimate financial liability").

In *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Supreme Court considered whether sovereign immunity applied to administrative adjudications conducted by the Federal Maritime Commission ("FMC"). In finding sovereign immunity prohibited the FMC from adjudicating complaints filed by private parties against non-consenting states, the Court said "[t]he preeminent purpose of state sovereign immunity

is to accord States the dignity that is consistent with their status as sovereign entities." *Id.* at 760; *see also id.* at 765 ("While state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens, the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns." (internal quotation marks and citations omitted)).

In light of *Doe* and *FMC*, we held that "we can no longer ascribe primacy to the [state-treasury] factor" in our sovereign immunity analysis. *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 239 (3d Cir. 2005). We still consider all three factors relevant in assessing whether an entity warrants Eleventh Amendment protection, but none is predominant. *Id.* at 240. SEPTA contends *Benn* "essentially relegated the 'state treasury factor' to a non-factor." SEPTA's Br. 19 n.8. Under this view, the District Court erred by giving equal consideration to each factor because, as SEPTA argues, "[w]hile the District Court's analysis may be appropriate where the status of an entity is uncertain under state law, given SEPTA's clear status as a Commonwealth agency, the District Court's approach effectively ignores the Supreme Court's mandate that protection of a State's dignity interests require [sic] giving greater credence to the State's intentions and the manner in which the State has structured the entity." *Id.* at 20. SEPTA contends our recent case law demonstrates that "the State's characterization and treatment of [an] entity" merits "substantial, if not dispositive" weight in our analysis. *Id.* at 21. But in the cases SEPTA cites as support, we gave equal consideration to each of the three *Fitchik* factors. *See Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524,

546 (3d Cir. 2007) ("[E]ach of the factors must be considered equally in this case . . . ."); *Febres*, 445 F.3d at 229 ("We now accord equal consideration to all three prongs of the analysis . . . ." (citing *Benn*, 426 F.3d at 239-40)). In *Benn*, we addressed whether the First Judicial District of Pennsylvania (Philadelphia's state court system) was entitled to sovereign immunity. We noted the funding scheme for this judicial system placed "considerable financial responsibility" on the local counties rather than the state. *Benn*, 426 F.3d at 240. But more significant was the judicial system's status under state law and its lack of autonomy from the Pennsylvania Supreme Court. Therefore, we concluded "the *Fitchik* factors strongly favor Eleventh Amendment immunity." *Id.* In *Febres*, we found two of the three factors – treasury and status – suggested the Camden Board of Education was not entitled to immunity, while the autonomy factor slightly favored a finding of immunity. 445 F.3d at 237. With two factors counseling against immunity, we held the Board was not an arm of the state. *Id.* In *Bowers*, we found the University of Iowa was entitled to sovereign immunity even though the state was not obligated to pay a judgment against the University. 475 F.3d at 549-50. Because the state-treasury factor weighed only slightly against immunity and the status and autonomy factors weighed heavily in favor of it, we held the University was entitled to immunity. *Id.*

As set forth in these post-*Bolden* cases, our inquiry into sovereign immunity is not merely "a formalistic question of ultimate financial liability." *Doe*, 519 U.S. at 431. We recognize and consider the state-treasury factor on the same terms as the other two *Fitchik* factors. It has not been reduced to a "non-factor," nor has the status factor become independently

"dispositive" of our sovereign immunity inquiry. *See Benn*, 426 F.3d at 240 ("The relegation of financial liability to the status of one factor co-equal with others in the immunity analysis does not mean that it is to be ignored. Like the other two factors referred to in *Fitchik*, it is simply to be considered as an indicator of the relationship between the State and the entity at issue."). Our approach is consistent with Supreme Court precedent following *Bolden*. As noted, the Court has stressed the centrality of state dignity to the Eleventh Amendment. But state dignity does not preclude consideration of an entity's financial relationship with the state and its degree of autonomy. *See, e.g.*, *Fed. Maritime Comm'n*, 535 U.S. at 765 (recognizing that "accord[ing] the States the respect owed them as joint sovereigns" is the "central purpose" of Eleventh Amendment immunity, and that "shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens" is an "important function" served by that doctrine (internal quotation marks omitted)). State dignity encompasses all three factors – we give them equal consideration, and how heavily each factor ultimately weighs in our analysis depends on the facts of the given case. Accordingly, we will apply the approach set forth in *Benn*, *Febres*, and *Bowers* here to reexamine each factor in light of the changes – both in the case law and in the funding structure of SEPTA – since *Bolden*. Though our method of balancing the factors has changed, our analysis of each individual factor in *Bolden* remains instructive.

IV.

A. *State Treasury*

As previously noted, the first factor asks "[w]hether the money that would pay the judgment would come from the state," which includes considering "whether payment will come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts." *Fitchik*, 873 F.2d at 659. We emphasized in *Bolden* the percentage of funding SEPTA received from the Commonwealth as the "most important fact" in this inquiry. 953 F.2d at 819. Accordingly, in determining the state-treasury factor weighed against a finding of immunity for SEPTA, we considered it very significant that SEPTA received only 27% of its revenues from the Commonwealth. *Id.*

Since *Bolden*, the amount of funding SEPTA receives from the Commonwealth has increased, although the precise amount is in dispute. SEPTA contends state subsidies constitute over half of its annual operating expenses.[6] Cooper responds that state funding constitutes 35% of these annual operating expenses. This disparity is explained by how the Commonwealth's contribution is calculated. Both parties rely on the affidavit of Richard G. Burnfield, the Senior Director of Budgets for SEPTA. In his affidavit, he said:

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[6] According to SEPTA, state subsidies constituted a 51% share in 2005 and a 52% share in 2006.

> For fiscal year 2006, $494,844,000 is budgeted to come from the Commonwealth for SEPTA's operating expenses. This budgeted amount includes $333,144,000 in operating subsidy, which includes direct payments to SEPTA's bondholders, through the Pennsylvania [Transportation] Assistance Fund, set up pursuant to the Public Transportation Assistance [provisions of Act 26]. It also includes $92.1 million in "flexed" highway funding. Also included is $52.3 million from the Commonwealth in a senior subsidy, and $17.3 million in the shared ride subsidy.

SEPTA considers all $494.8 million to be state funding, while Cooper contends only the operating subsidy, amounting to approximately $333.1 million, constitutes state funding. Cooper cites SEPTA's 2006 budget, which defines "subsidy" as "[f]unds received from another source that are used to cover the cost of a service or program that is not self-supporting."[7]

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[7] Cooper contends SEPTA's numbers are wrong for two reasons. First, the $92.1 million in "Flexible Highway funds" is provided by the federal government, not by the Commonwealth, which Burnfield acknowledges. These "flex funds" are allocated by the Commonwealth but are subject to approval by the Delaware Valley Regional Planning Commission, an "interstate, intercounty and intercity agency." Cooper's Br. 18-19. Second, Cooper contends SEPTA's $52.3 million "senior subsidy" and its $17.3 million "shared ride subsidy" are operating revenue, not part of the state's subsidies. *Id.* at 20-21.

The flex funds and the senior and shared ride subsidies are not treated the same by SEPTA or the Commonwealth for accounting purposes. SEPTA's budget defines two types of funding sources – operating revenue and subsidies – and notes that, under SEPTA's enabling legislation, no less than half of SEPTA's budget

It is unclear whether all of these contributions should be considered part of the Commonwealth's funding of SEPTA. The funds are, at least to some extent, under the Commonwealth's control, and are being given to SEPTA. Whether SEPTA now receives 35% or 52% of its revenue from the Commonwealth, however, is not determinative. Although relevant, the percentage of Commonwealth funding is no longer predominant. Since *Doe*, we have recognized that "the crux of the state-treasury criterion [is] whether the state treasury is legally responsible for the payment of a judgment against the [entity]." *Febres*, 445 F.3d at 233; *see also Bowers*, 475 F.3d at 547 ("The appropriate question to ask . . . is whether the State is *obligated* to pay or reimburse the [entity] for its debts."). In *Febres*, we explained that, even though the Camden Board of Education received 85% to 90% of its funding from New Jersey, "the fact that New Jersey is the principal source of the Board's finances does not alone confer immunity, or even compel a finding that this prong of the analysis favors immunity." 445 F.3d at 232-33; *see also id.* at 233 n.5 (noting that "the quantity or proportion of state funding received by an entity is not dispositive," but may be "potentially probative").

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must be funded through operating revenue. In order to meet this requirement, the Commonwealth has allowed SEPTA to count certain subsidies as revenue. According to Burnfield, the senior and shared ride subsidies were considered operating revenue in order to satisfy this requirement.

Similarly, the flex funds were described as a federal subsidy in every SEPTA budget until 2007, when the funds were then described as a state subsidy. This recharacterization was not due to any change in legislation; rather, SEPTA felt the funds were better described as state subsidies because the Governor had to initiate action to allocate them to SEPTA.

Although, relative to *Bolden*, the increased proportion of Commonwealth funding SEPTA now receives – whether 35% or 52% – improves SEPTA's argument for immunity under the state-treasury factor, we no longer afford this subfactor the same weight we did in *Bolden*.[8]

Post-*Doe*, "the key factor in our assessment of the state-treasury prong" is the potential legal liability of the Commonwealth for SEPTA's debts. *Febres*, 445

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[8] Nor are we able at this time to forecast what impact, if any, the enactment of Act 44 may have on the extent of funding SEPTA receives from the Commonwealth. As noted, Act 44, 74 Pa. Cons. Stat. §§ 1501–1520, was enacted after briefing but before oral argument. Act 44 repealed the provisions under Title 74's "Public Transportation Assistance" chapter, most of which were enacted as part of Act 26, and set forth a new chapter entitled "Sustainable Mobility Options." This new chapter established the Public Transportation Trust Fund ("PTTF"), from which public transit entities throughout the state may apply for and receive funding. *See id.* § 1506. Under Act 26, the Commonwealth annually determined the level of appropriation to distribute to these entities. *See* 74 Pa. Cons. Stat. § 1303(a) (repealed 2007). Now, Act 44 sets forth the amount to be placed into the PTTF each year. 74 Pa. Cons. Stat. § 1506(b)(1). From 2007 to 2010, $250 million is placed into the fund each fiscal year, and for every fiscal year thereafter, the fund will be increased 2.5% from the previous year's amount. *Id.* Although the Commonwealth may contribute more money to SEPTA because of the PTTF's creation, there is no evidence as to how much money SEPTA will receive from the PTTF. While the statute sets forth a definitive number for the fund overall, public transit entities from around the state may apply for financial assistance, so we cannot know whether the Commonwealth will contribute more to SEPTA because Act 44 was enacted. Accordingly, since Act 44's impact on SEPTA's funding is still uncertain, we will not give it weight in our consideration of the state-treasury factor.

F.3d at 236. By statute, the Commonwealth has disclaimed any liability for SEPTA's debts:

> The authority shall have no power, at any time or in any manner, to pledge the credit or taxing power of the Commonwealth or any other government agency, nor shall any of the authority's obligations be deemed to be obligations of the Commonwealth or of any other government agency, nor shall the Commonwealth or any government agency be liable for the payment of principal or interest on such obligations.

74 Pa. Cons. Stat. § 1741(c). SEPTA concedes that the Commonwealth is not obligated to pay for an adverse judgment against it. This absence of legal liability provides "a compelling indicator that the state-treasury criterion . . . weighs against immunity." *Febres*, 445 F.3d at 236.

Nevertheless, SEPTA contends the Commonwealth, despite its legal shield from liability, would be forced as a practical matter to pay excess judgments against SEPTA. Thus, the arguable practical effect of an adverse judgment against SEPTA would be an increase in state funding. But "if a State is not under a legal *obligation* to satisfy a judgment, then any increase in expenditures in the face of an adverse judgment is considered a voluntary or discretionary subsidy not entitled to Eleventh Amendment protections." *Bowers*, 475 F.3d at 547; *see also Bolden*, 953 F.2d at 819 ("Such discretionary subsidies committed in reaction to a judgment . . . would not necessarily transform the recipients into alter egos of the state."); *Fitchik*, 873 F.2d at 661 ("Although New

Jersey might appropriate funds to [New Jersey Transit] to meet any shortfall caused by judgments against [New Jersey Transit], such voluntary payments by a state do not trigger sovereign immunity."). Although in *Febres* we did not disregard the practical effects of an adverse judgment, neither did we afford them substantial weight:

> In view of the controlling Supreme Court jurisprudence, as well as our own conforming case law, we find that the practical or indirect financial effects of a judgment may enter a court's calculus, but rarely have significant bearing on a determination of an entity's status as an arm of the state.

445 F.3d at 236.

In support, SEPTA points to two cases in which Courts of Appeals have found transit operations were arms of the state. *See Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378 (9th Cir. 1993); *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218 (D.C. Cir. 1986). These cases were cited by the Supreme Court in *Hess* and their facts, as we noted in *Febres*, "suggest the types of limited circumstances in which the Court might expect . . . concerns [regarding the practical effects of an adverse judgment] to require immunity, regardless of the state's legal liability." *Febres*, 445 F.3d at 235 n.9. In rejecting sovereign immunity, our analysis in *Febres* distinguished both cases:

> In *Morris*, immunity was accorded to an interstate transit system. Analysis of both the entity's status under state law and its limited

> autonomy suggested it was an arm of the two states the transit system served. While the states involved were not directly liable, Congressional funding for the system was made contingent upon the states' agreement to meet the system's operating deficits, which could include adverse judgments. And, from the beginning it was fully anticipated that the entity would have large deficits and thus continually be dependent on the states for its financial survival. *Alaska Cargo Transport* held that the railroad at issue was entitled to immunity as an alter ego of the state, even though the state had expressly disclaimed liability for it by statute. The case turned on the critical function performed by the railroad in Alaska, and federal laws which essentially required the state to keep the railroad afloat.

Id. (citations omitted).

SEPTA's funding relationship with the Commonwealth does not fall within such "limited circumstances." *Morris* and *Alaska Cargo Transport* are factually distinguishable. In *Morris*,, the states at issue were compelled to cover the deficits of the bi-state transit system because, if they did not, they would lose congressional funding. 781 F.2d at 225-26. In *Alaska Cargo Transport*, Alaska would have lost the real property conveyed to it by the United States if the railroad failed. 5 F.3d at 381. The Commonwealth here does not face the same sort of practical obligation to support SEPTA in the event of an adverse judgment. As the District Court found, if the Commonwealth fails to cover a deficit, SEPTA can satisfy the deficit itself by raising fares, reducing service, and/or laying off

employees. The Commonwealth may choose to relieve SEPTA of these measures, but it is not obligated – through risk of losing its own funding or its own property – to do so. *Cf. Hess*, 513 U.S. at 49-51 (distinguishing *Morris* and *Alaska Cargo Transport* and finding that, since "legally and practically" neither New York nor New Jersey was "obligated to bear and pay . . . [PATH's] indebtedness . . . [,] the Eleventh Amendment's core concern [was] not implicated").

According to SEPTA, measures like fare increases and service reductions "are not practical options under the circumstances" because "the fare increases and service cuts necessary to meet SEPTA's budget shortfall would so reduce the level of service and ridership as to create a public crisis in the region." SEPTA's Br. 32 (internal quotation marks and emphasis omitted). Given these consequences, SEPTA contends, the Commonwealth would effectively be obligated to increase its funding to cover any excess judgment. While fare increases, service reductions, and/or employee layoffs are not the preferred method of meeting budget deficits, these measures are available to SEPTA[9] and do not give rise to an obligation for the Commonwealth. Accordingly, even when we allow the practical effects asserted by SEPTA to "enter [our] calculus," we believe this is not the rare case in which such considerations should have any

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[9] Although SEPTA presents these measures as impractical, it did account for them in its budget: "Further efforts to achieve the legislated balanced budget can only be successful through a long-term dedicated source of subsidies. If this fails, SEPTA will be forced to consider steep fare increases and significant service reductions in order to fund projected budget deficits of nearly $325 million by Fiscal Year 2011."

"significant bearing" on our determination. *Febres*, 445 F.3d at 236.

Despite SEPTA's practical-effects argument, the state-treasury factor weighs against a finding of immunity. While the Commonwealth provides substantial funding, SEPTA also receives a significant amount of its funding from non-state sources of revenue – and whether two-thirds or one-half of SEPTA's overall budget, it totals in the hundreds of millions. SEPTA could satisfy an adverse judgment from these sources, or through alternate measures such as raising fares or reducing service. *See id.* at 233-34 (noting that, "[w]hile non-state funds comprise a relatively small percent of the Board's budget, they still total a significant sum [of nearly $32.5 million]," and the Board could "increase funds" further by "reduc[ing] expenses" or "sell[ing] assets"). SEPTA has provided no evidence that the Commonwealth would, in fact, contribute additional funding to SEPTA in the event of an excess judgment. *See id.* at 236 ("While we have little doubt that the state has an interest in seeing that Camden's schools remain operational, it would be improper to confer immunity based on our conjecture about the steps New Jersey might take following a judgment."). Most importantly, the Commonwealth is not legally obligated to provide funds to satisfy a judgment against SEPTA. As *Doe* makes clear, the state's potential legal liability is the "key factor" under this prong of analysis and "merits far greater weight" than practical consequences. *Id.* And, as discussed, SEPTA's asserted consequences do not give rise to the sort of practical obligation that could, in some circumstances, bear on our determination. Accordingly, the relevant criteria under

the state-treasury factor weigh against a finding of sovereign immunity.

B. *Status Under State Law*

Under the second factor, we consider "[t]he status of the agency under state law," which includes "how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation." *Fitchik*, 873 F.2d at 659; *see also Febres*, 445 F.3d at 230 (noting these as the "[f]our sub-factors . . . relevant to assessing [an entity's] legal status under state law"). According to SEPTA, the Commonwealth's statutory declaration that SEPTA is an arm of the state is essentially dispositive of this factor and our overall inquiry. But as noted, we disagree, and little has changed with regard to SEPTA's status under state law since *Bolden*.

The subfactors here do not point clearly in one direction. Certain attributes of SEPTA under state law weigh against immunity. Under its enabling statute, SEPTA has (1) a separate corporate existence, 74 Pa. Cons. Stat. § 1711(a); (2) the power to sue and be sued, *id.* § 1741(a)(2); and (3) the power to enter into contracts and make purchases on its own behalf, *id.* § 1741(a)(8), (9), (12), (18), (20), (21), (22), (24), (25). Other attributes support immunity: (1) its enabling statute provides that SEPTA "shall in no way be deemed to be an instrumentality of any city or county or other municipality or engaged in the performance of a municipal function, but shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof," *id.* § 1711(a), and "shall

continue to enjoy sovereign and official immunity, as provided [by the statutory provisions that comprise and pertain to the Pennsylvania Sovereign Immunity Act]," *id.* § 1711(c)(3);[10] (2) SEPTA has the power of eminent domain, *id.* § 1741(a)(13);[11] and (3) SEPTA is immune from state taxation.[12] As noted in *Bolden*, 953 F.2d at 820, Pennsylvania state courts have recognized SEPTA to be a Commonwealth agency to which the Pennsylvania Sovereign Immunity Act applies. *See, e.g.*, *Jones v. SEPTA*, 772 A.2d 435, 444 (Pa. 2001) (holding SEPTA immune in a tort case because the case did not fall within an exception to the Sovereign Immunity Act); *Feingold v. SEPTA*, 517 A.2d 1270, 1276-77 (Pa. 1986) (finding that SEPTA is "an agency of the Commonwealth" against whom "it would be inappropriate to assess punitive damages"). In other

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[10] This particular language from § 1711(c)(3) was not in effect at the time of our decision in *Bolden*, but first appeared as one of the "transition provisions" codified under § 1711(c) when SEPTA's enabling legislation was amended in 1994. The language from § 1711(a), however, was in effect at the time of *Bolden* and was considered in our analysis there. *See Bolden*, 953 F.2d at 820 (quoting 55 Pa. Stat. Ann. § 600.303(a) (West 1991) (repealed 1991); Act 26, 74 Pa. Cons. Stat. § 1502 (repealed 1994)).

[11] In *Fitchik*, we did not accord significant weight to this factor because counties, municipalities, and privately owned public utilities all have the power of eminent domain. 873 F.2d at 663.

[12] The District Court said the Supreme Court of Pennsylvania, in *SEPTA v. Board of Revision of Taxes*, 833 A.2d 710 (Pa. 2003), held SEPTA is not immune for all purposes from state taxation. That case, however, addressed SEPTA's immunity from local real estate taxes, finding SEPTA was not immune from these taxes for property it operates as a commercial landlord because such use was not within its operations as a "metropolitan transportation authority." *Id.* at 717.

contexts, however, Pennsylvania courts have declined to treat SEPTA as the Commonwealth. *See, e.g.*, *Fraternal Order of Transit Police v. SEPTA*, 668 A.2d 270, 272 (Pa. Commw. Ct. 1995) (holding "that for purposes of determining jurisdiction, SEPTA is a local agency and not a Commonwealth agency"); *SEPTA v. Union Switch & Signal, Inc.*, 637 A.2d 662, 669 (Pa. Commw. Ct. 1994) ("Because SEPTA is financially independent of the Commonwealth and its operations are not statewide, we conclude that the General Assembly did not intend SEPTA to be the Commonwealth for purposes of the Board Claims Act."); *Fisher v. SEPTA*, 431 A.2d 394, 397 (Pa. Commw. Ct. 1981) ("We do not believe that the Legislature intended SEPTA to be a Commonwealth agency in the traditional sense or for SEPTA employees to be considered Commonwealth employees for purposes of other legislative enactments.").

SEPTA contends that, in light of Supreme Court precedent, the "explicit treatment of SEPTA as a Commonwealth agency entitled to sovereign immunity cannot be evaluated as merely just another 'factor' – let alone one which weighs only 'slightly' in favor of immunity – but should effectively be dispositive as to whether SEPTA is an arm of the State." SEPTA's Br. 23-24. According to SEPTA, the District Court "inappropriately minimize[d] the significance of how the Commonwealth has structured SEPTA and intentionally invested the agency with sovereign immunity." *Id.* at 21-22.

The Commonwealth's designation of SEPTA as an agency covered under the Pennsylvania Sovereign Immunity Act is significant but not dispositive. As discussed, SEPTA's enabling legislation grants it

attributes that are characteristic of an arm of the state, and those that are not. In *Bolden*, we rejected SEPTA's contention that "the Pennsylvania Sovereign Immunity Act conferred Eleventh Amendment protection upon SEPTA." 953 F.2d at 817; *see also id.* (explaining that "[i]f this reasoning were accepted, each state legislature apparently could confer Eleventh Amendment protection on any entity it wished, including counties and cities, by enacting a statute clothing these entities with 'sovereign immunity' from suit on state claims"). Although we have revised our immunity analysis since *Bolden*, we do not believe this alters our ultimate conclusion on this point.

In *Doe*, the Court recognized that an inquiry into an agency's immunity "can be answered only after considering the provisions of state law that define the agency's character." 519 U.S. at 429 n.5. The Court also made clear that "[u]ltimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State . . . is a question of federal law." *Id.* This distinction corresponds with the status-under-state-law analysis we applied in *Bolden* and have applied since. The Commonwealth's statutory declaration of SEPTA's immunity under state law is significant but not "dispositive"of our inquiry – it is certainly relevant, but does not necessarily overshadow the other relevant subfactors in assessing an agency's status under state law for Eleventh Amendment purposes.

SEPTA misinterprets the District Court's analysis. The court did not find the Commonwealth's characterization of SEPTA weighed only slightly in favor of finding immunity; rather, the court weighed

that consideration together with the other subfactors in the status-under-state-law analysis. SEPTA's status under state law has not changed markedly since *Bolden* – it retains the same essential attributes as before. Nor has the law since *Bolden* changed in a manner that would alter the outcome when these attributes are weighed together. Accordingly, we find SEPTA's status under state law weighs slightly in favor of a finding of sovereign immunity.

C. *Autonomy*

Under the third factor, we consider "[w]hat degree of autonomy the agency has." *Fitchik*, 873 F.2d at 659. The District Court found SEPTA's autonomy from the Commonwealth has not changed since *Bolden*. While SEPTA's organizational structure has remained the same over that time, SEPTA contends the Commonwealth's current statutory scheme for the financing of public transportation – which allows the Commonwealth to oversee and place certain requirements on the use of the funds it provides to SEPTA – marks a significant change in SEPTA's autonomy.

In *Bolden*, we did not explicitly say whether the autonomy factor weighed in favor of granting or denying immunity. We noted that, while this factor weighed slightly in favor of immunity for New Jersey Transit in *Fitchik*, SEPTA enjoyed greater autonomy than New Jersey Transit, making its argument for immunity under this factor "appreciably weaker." *Bolden*, 953 F.2d at 820. The structure of SEPTA's board has not changed since *Bolden*. SEPTA's board includes five members who are appointed by the Commonwealth, while the remaining ten members are

appointed by the counties SEPTA serves.[13] 74 Pa. Cons. Stat. § 1713(a). The board's decisions are not subject to gubernatorial veto. Moreover, the board has substantial authority: it has the power to bring lawsuits; organize its internal structure; buy insurance; buy, sell, or lease property; set and alter fares; and enter into contracts. The District Court, looking at this unchanged structure, found the autonomy factor weighed against immunity.

SEPTA contends its autonomy has decreased since *Bolden* because of the passage of Act 26. We did not consider Act 26 in *Bolden* because we believed its future impact was too uncertain at that time. 953 F.2d at 819-20. In creating a dedicated source of Commonwealth funding for public transit entities, Act 26 increased the Commonwealth's oversight of SEPTA – by, for example, requiring SEPTA to submit budgets and accountings to the Pennsylvania Department of Transportation ("PennDOT"), to perform audits and submit action plans to the Pennsylvania legislature, and to seek the review and approval of the Commonwealth for use of the distributed funds in SEPTA's capital projects. *See* Act 26, 74 Pa. Cons. Stat. §§ 1301–1313 (repealed 2007), § 1314 (repealed 1994). Act 44, however, recently replaced this portion of Act 26.

Act 44 established the Public Transportation Trust Fund ("PTTF"), which provides a source of state

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[13] As we noted in *Bolden*, the board's makeup suggests influence on SEPTA by the counties, but "it is the influence of the state, not that of the counties, that is important for Eleventh Amendment purposes." 953 F.2d at 820.

funding for public transportation, and set forth certain requirements for public transit providers to obtain funding. To initiate funding through the PTTF, a provider of public transit must submit a written application to PennDOT. 74 Pa. Cons. Stat. § 1507(a). If PennDOT determines the applicant is eligible, PennDOT and the applicant enter into a "financial assistance agreement," which "set[s] forth the terms and conditions governing the use of the financial assistance and the timing of payment of the funds." *Id.* § 1507(b). PennDOT is required to develop guidelines governing the application for and awarding of financial assistance. *Id.* All funds "shall be used only for activities set forth under the financial assistance agreement unless the department grants the award recipient a waiver allowing the funds to be used for a different purpose." *Id.* § 1507(c). PennDOT also "may conduct performance reviews of an award recipient . . . to determine the effectiveness of the financial assistance." *Id.* § 1513(e)(1). Based on these reviews, PennDOT must deliver a report to the Governor and to the chair and minority chair of both the House and Senate Transportation Committees. *Id.* § 1513(e)(2). If a recipient does not satisfy certain "performance criteria" set forth by PennDOT, it risks losing funding, although PennDOT may also waive any reduction in funding upon a recipient's written request. *Id.* § 1513(g).

Act 26 and Act 44 have increased the Commonwealth's level of oversight since *Bolden*. But the Commonwealth's control over SEPTA is not sufficient to support a finding of immunity under this factor. Act 44 allows the Commonwealth, through financial assistance agreements, to set terms and conditions for the use of the funds provided to SEPTA.

Thus, the more SEPTA relies on the Commonwealth for funding, the greater the impact this financing scheme may have on SEPTA's autonomy. As it currently stands, however, sources other than the Commonwealth contribute one-half to two-thirds of SEPTA's funding, a substantial sum over which the Commonwealth exerts no control. Should the percentage of SEPTA's funding provided by the Commonwealth increase, the Commonwealth's potential influence over SEPTA would also increase under the terms and conditions it may choose to impose on those funds. But, as previously noted, we are presently unable to forecast whether and to what extent such an increase may occur under Act 44.

Furthermore, even though this financing scheme may grant the Commonwealth more influence over SEPTA than it enjoyed in *Bolden*, the amount of autonomy SEPTA retains with respect to its operations and decisions demonstrates that it is still not an arm of the state. *Febres* provides a good comparison. In that case, the Camden Board of Education was subject to a New Jersey statute that granted the Governor authority to accept or reject any action taken by the Board. *Febres*, 445 F.3d at 231. The Governor also appointed board members, though not enough to make a majority. *Id.* Given this degree of state control, we found the autonomy factor weighed slightly in favor of Eleventh Amendment immunity. *Id.* at 232.

The amount of state control in *Febres* exceeds the amount of Commonwealth control here. While PennDOT can influence SEPTA by setting certain requirements for the use of Commonwealth funds, the Commonwealth lacks a mechanism, such as the gubernatorial veto in *Febres*, by which it may dictate

the outcome of decisions made by SEPTA's board of directors. As noted, the Commonwealth appoints only a minority of the directors on the board, nor does it review every board decision. Through conditional funding, the Commonwealth can affect the consequences of these decisions, limiting SEPTA's autonomy to some extent. But this is insufficient to transform SEPTA into an arm of the state. Nor does it distinguish SEPTA from other entities that do not enjoy sovereign immunity – the Commonwealth exercises this same conditional-funding influence over any entity that applies for financial assistance through the PTTF, including political subdivisions which, as the Supreme Court has made clear, are not arms of the state.[14] *See Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) ("[T]he Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities . . . ."); *see also Bolden*, 953 F.2d at 813 (recognizing the same). Given how recently Act 44 was enacted, the precise degree of control the Commonwealth wields over SEPTA through this financing scheme is still uncertain at this time. We do not know yet how the scheme will be interpreted and implemented – the evidence before us, for example, does not include an Act 44 "financial assistance agreement" with which SEPTA would have to comply in order to receive Commonwealth funding. Thus, as with Act 26 in *Bolden*, it is too early for us to tell what impact, if any,

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[14] Act 44 specifies the following entities as eligible applicants "for financial assistance for operating expenses": "(1) The governing body of a municipality or an instrumentality of a municipality. (2) A Commonwealth agency or instrumentality. A local transportation organization." 74 Pa. Cons. Stat. § 1513(a).

Act 44 may have on SEPTA's autonomy from the Commonwealth.

While SEPTA's autonomy has diminished since *Bolden* because of the Commonwealth's financing scheme under Act 26 and now Act 44, it is SEPTA's burden to show it is entitled to sovereign immunity. *Febres*, 445 F.3d at 229. Based on the evidence presented, the Commonwealth's control over SEPTA falls short of the state control present in *Febres*, a case in which we found the autonomy factor weighed only slightly in favor of sovereign immunity. Here, by comparison, we find this factor weighs slightly against a finding of Eleventh Amendment immunity.

D. *Balancing the Factors*

As noted, we no longer give primacy to the state-treasury factor in our immunity analysis. Instead, we give equal consideration to all three factors and weigh and balance them. Here, despite an increase in state funding, the state-treasury factor still weighs against a finding of sovereign immunity. As SEPTA's status under state law has not changed significantly since *Bolden*, that factor weighs slightly in favor of immunity. The autonomy factor weighs slightly against immunity. Balancing these factors, we agree with the District Court that SEPTA is not entitled to Eleventh Amendment immunity.

V.

Accordingly, we will affirm the District Court's denial of SEPTA's motion for summary judgment. We will remand to the District Court for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1522

[Filed November 26, 2008]

ALLISON COOPER, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED	)
v.	)
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Appellant	)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 06-cv-0888
(Honorable Thomas M. Golden)

Argued March 4, 2008

Before: SCIRICA, *Chief Judge*,
FISHER and ROTH, *Circuit Judges*.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 4, 2008. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered February 13, 2007, be, and the same is hereby affirmed and the case remanded for proceedings consistent with this opinion. Cost taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED November 26, 2008

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 06-888

[Filed February 12, 2007]

ALLISON COOPER, on behalf of herself and all others similarly situated, c/o Transport Workers Union Local 234	)
v.	)
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	)

MEMORANDUM OPINION AND ORDER

GOLDEN, J. FEBRUARY , 2007

The Plaintiff, a bus driver for the Defendant Southeastern Pennsylvania Transportation Authority ("SEPTA"), brought this action, claiming that SEPTA violated the Fair Labor Standards Act, 29 U.S.C. § 207(a), by refusing to pay her for the time she spends performing mandated daily pre-trip inspections of her

bus.[1] Presently before the Court is the motion of SEPTA to dismiss the FLSA claim on Eleventh Amendment grounds.[2] Because the Court has allowed Plaintiff to take limited discovery, including depositions, on the issue of the changes in SEPTA's funding since the Court of Appeals decided Bolden v. Southeastern Pennsylvania Trans. Auth., 953 F.2d 807 (3d Cir. 1991) (en banc), cert. denied, 504 U.S. 943 (1992), the Court will construe the motion as one for summary judgment under Fed.R.Civ.P. 56. See Fed.R.Civ.P. 12(b). For the reasons which follow, the motion is denied.

Summary judgment is appropriate if the moving party can "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. Matsushita Elec. v. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). For a dispute to be "genuine," the evidence much be such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the initial burden of showing the absence

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[1] This case was originally assigned to the Honorable Stewart Dalzell, then reassigned to the calendar of the undersigned on August 10, 2006.

[2] Plaintiff also asserted several claims against SEPTA under state law, but concedes in her response brief that these claims are without merit. Memorandum in Opposition to Defendant's Motion to Dismiss at p. 20. The accompanying Order disposes of those claims.

of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has done so, the non-moving party must make a showing sufficient to establish the existence of every element essential to that party's case, based on the affidavits or by depositions and admissions on file. Anderson, 477 U.S. at 255.

Because the motion for summary judgment deals solely with the status of SEPTA under the Eleventh Amendment, the Court will dispense with any recitation of the facts giving rise to Plaintiff's FLSA claim.

SEPTA argues generally that Plaintiff's claims against it under the FLSA are barred by the Eleventh Amendment because SEPTA is "arm of the state" entitled to sovereign immunity. The burden of proving Eleventh Amendment immunity is on the party asserting it, in this case, SEPTA. Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1144 (3d Cir. 1995).

It is well-settled, of course, that the Eleventh Amendment[3] immunizes an unconsenting state from suits brought in federal court by its own citizens as well as by citizens of another state. See e.g., Hans v. Louisiana, 134 U.S. 1 (1890); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

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[3] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In addition, a suit may be barred by the Eleventh Amendment even though a state is not a named party to the action, so long as the state is deemed the real party in interest. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997); Edelman v. Jordan, 415 U.S. 651, 663 (1974); Fitchik v. N.J. Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir. 1989).

In Fitchik, the Third Circuit held that in order to determine whether a suit against an entity is actually a suit against the state itself, a court must consider: (1) the source of the money that would pay the judgment (i.e., whether that source would be the state); (2) the status of the entity under state law; and (3) the degree of autonomy the entity has. Id. The Third Circuit emphasized that the most important factor was "whether any judgment would be paid from the state treasury." Id.

In 1991, the Third Circuit had occasion to consider whether SEPTA was a state entity by applying the Fitchik factors. Bolden, supra. With respect to the first factor, The Third Circuit found that the statistics relied on by SEPTA showed that only about 27% of its revenues came from the Commonwealth of Pennsylvania. Id. at 819. The Third Circuit also noted that SEPTA has "'no power...to pledge the credit or taxing power of the Commonwealth,'" its obligations may not "'be deemed to be obligations of the Commonwealth,'" and the Commonwealth is not "'liable for the payment of principal or interest on such obligations.'" Id., quoting 1991 Pa. Laws 26, § 1503(21); 55 Pa.Stat.Ann. § 600.303(d)(20) (1991 Supp.). The Third Circuit also noted that SEPTA need not "'request funds from the state coffers in order to meet shortfalls caused by adverse judgments,'" id.

quoting Fitchik, 873 F.2d at 661, but "'can raise revenues by raising fares.'" Id. quoting Act 26 § 1503(9); 55 Pa.Sta.Ann. § 600.303(d)(9) (Purdon 1991 Supp.). Finally, the Third Circuit rejected SEPTA's argument that it might have to rely on additional state subsidies in the event raising fares proved insufficient, stating that voluntary payments by the state do not trigger the immunity of the Eleventh Amendment. Id., citing Fitchik, 873 F.2d at 661. As a result, the Third Circuit concluded that the first factor weighed "strongly" against SEPTA's claim of immunity.

With respect to the second factor, status under state law, the Third Circuit noted that SEPTA has a separate corporate existence, the power to sue and be sued, and the power to enter into contracts and make purchases on its own behalf. Bolden, 953 F.2d at 820. The Third Circuit stated that SEPTA also possesses certain attributes associated with sovereignty such as exemption from state property taxation and the power of eminent domain. Id. In addition, SEPTA, like the Commonwealth of Pennsylvania, is subject to the Pennsylvania Sovereign Immunity statute. Id. Finally, the Third Circuit noted that although SEPTA is proclaimed by statute to be "an agency and instrumentality" of the Commonwealth, the same provision described SEPTA as a "'separate body corporate and public.'" Id., quoting Pa.Stat.Ann. tit. 55, § 600.303(a) (Purdon 1991 Supp.); 26 Act § 1502. The Third Circuit concluded that the second factor weighs "slightly" in favor of Eleventh Amendment protection. Bolden, 953 F.2d at 820.

With regard to the third factor, autonomy, the Third Circuit noted that SEPTA's board of directors enjoy a wide range of autonomy, including the power

to enter into contracts, bring lawsuits, purchase and sell property, buy insurance, set and collect fares. Id. SEPTA's actions are also not subject to gubernatorial veto. Id. Only five of the fifteen board members are appointed by state officials. Id. The remainder are appointed by the counties that SEPTA serves. Id. The Third Circuit concluded that the third factor was "weak[]" with regard to Eleventh Amendment immunity. Id.

The Court of Appeals decided that the totality of the three factors, with funding being the most important, weighed against finding that SEPTA was an arm of the state for purposes of the Eleventh Amendment. Id. at 821.

In an attempt to extricate itself from the Bolden precedent, SEPTA first argues that certain changes in the law regarding the Eleventh Amendment have occurred since Fitchik and Bolden were decided which have in effect rendered those decisions "outdated." SEPTA is mistaken.

The only change that has occurred in Third Circuit jurisprudence regarding Eleventh Amendment immunity since Fitchik and Bolden were decided is that the Third Circuit now accords equal consideration to all three Fitchik factors. Febres v. Camden Board of Education, 445 F.3d 227, 229 (3d Cir. 2006); Benn v. First Judicial District, 426 F.3d 233, 239-40 (3d Cir. 2005). It is only in close cases, "where indicators of immunity point in different directions" that the first factor should remain "our primary guide." Hess v. Port Authority Trans-Hudson Corp. 513 U.S. 30, 47, 48 (1994). Indeed, just last year the Third Circuit employed the Fitchik factors in finding that the

Camden County Board of Education was not an arm of the State of New Jersey. Febres, supra.

In the alternative, SEPTA argues that even applying the Fitchik factors, its financial condition has drastically changed since the Third Circuit decided Bolden and that the funding factor now weighs heavily in its favor. In support of its argument, SEPTA points out 1) its "structural operating deficit" is projected to exceed $50 million in fiscal year 2007 and is projected to increase to $160 million in fiscal year 2008; 2) the state's share of SEPTA's budget now constitutes 52 percent of SEPTA's total budget for operating expenses and 3) the state provides more than $130 million in capital funding subsidies this year.[4]

With regard to the state treasury prong of the Fitchik analysis, the "key factor" is the "state's legal liability (or lack thereof) for an entity's debts." Febres, 445 F.3d at 236. "The absence of any legal obligation on the part of [a state] to provide funds in response to an adverse judgment against [the entity] is a compelling indicator" the state treasury prong of the Fitchik test weighs against immunity. Id.

Here, the Commonwealth of Pennsylvania has specifically disclaimed responsibility for SEPTA's liabilities:

> [SEPTA] shall have no power, at any time or in any manner, to pledge the credit or taxing power of the Commonwealth or any other government agency, nor shall any of the

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[4] Septa's Motion to Dismiss Complaint at 14-20.

> authority's obligations be deemed to be obligations of the Commonwealth or of any other government agency, nor shall the Commonwealth or any other government agency be liable for the payment of principal or interest on such obligations.

74 Pa.C.S. § 1741(c).

Pursuant to the tenets of the Third Circuit in Febres, this absence of any legal obligation on the part of the Commonwealth of Pennsylvania to satisfy any adverse judgment against SEPTA is a "compelling indicator" that the funding prong of the Fitchik test weighs against immunity.

SEPTA nevertheless stresses that it receives a large amount of subsidies from the Commonwealth, indeed more than it received at the time Bolden was decided, and that these significant state subsidies make SEPTA an arm of the state. To support this contention, SEPTA has attached to its Motion to Dismiss as Exhibit A the affidavit of its Senior Director of Budgets, Richard G. Burnfield.

Burnfield avers, inter alia, that the Commonwealth of Pennsylvania is now the single largest source of funding for SEPTA, having provided in excess of $625.1 million in state subsidies in fiscal year 2006. Burnfield Affidavit at ¶ 28. According to Burnfield, SEPTA is currently projecting a structural operating deficit for the remaining six months of fiscal year 2007 exceeding $ 50 million and in 2008 to exceed $160 million. Id. at ¶¶ 10-11. Burnfield avers that "[t]he fare increases and service cuts necessary to meet SEPTA's budget shortfall would so reduce the level of

service and ridership as to create a public crisis in the region." Id. at ¶ 12.

Attached to Burnfield's Affidavit as Exhibit A is a chart displaying the history of SEPTA's operating subsidy funding. For Fiscal Year 2006, the chart shows that 35% of SEPTA's total budget for operating expenses came from state subsidies as opposed to 31.7% in 1991, the year Bolden was decided. Exhibit B shows that the percent for Fiscal Year 2006 swells to 44.7% when the total operating budget includes $92.1 million in Federal Highway Funds the Commonwealth elected to transfer as operating funding to SEPTA. Indeed, in his affidavit, Burnfield claims the total is actually 52%. Burnfield Affidavit at ¶ 25.[5]

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[5] Plaintiff takes issue with many of SEPTA's statistics. For example, Plaintiff points out that in SEPTA's 2006 budget, flexible funds are defined as:

> Flexible Funds–*Federal funds* made available by [The Transportation Equity Act for the 21st Century, signed into law by President Clinton in 1998] that can be used for various transportation projects, including both highway and mass transit projects. Allocation of these funds is at the discretion of regional Metropolitan Planning Organizations (MPOs) and state governments.

Exhibit 5 to Affidavit of Jordan M. Lewis, Esq. at 206. (Emphasis added). Plaintiff contends that the allocation of flexible funds is subject to approval by the Delaware Valley Regional Planning Commission, which is an "interstate, intercounty and intercity agency", not an arm of the Commonwealth of Pennsylvania. Exhibit 4 to Lewis Affidavit. Thus, claims Plaintiff, Burnfield's averment that flexible highway funds are part of the state subsidy is inconsistent with SETA's 2006 budget, where the funds are classified as *federal* subsidies.

Plaintiff also points out that in its Exhibit B to the Burnfield Affidavit, SEPTA has moved its "senior subsidy" of 52.3 million

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and its "shared ride subsidy" of $17.3 million from its own revenue totals and now counts them as part of its state subsidy. Plaintiff's Supplemental Memorandum at 11. In his affidavit Burnfield, avers: "The senior subsidy and shared ride subsidy come from state funds generated by the Pennsylvania lottery. If the lottery funds are insufficient to meet SEPTA's subsidy needs, state law provides that the subsidy is to come from the state's general revenue fund." Burnfield Affidavit at ¶ 21.

Plaintiff contends that a review SEPTA's own 2006 budget yields a contrary result. The 2006 budget states:

> SEPTA's enabling legislation requires that no less than half of SEPTA's budget be funded through operating revenue. For this purpose, the Commonwealth has defined operating revenue to include Passenger Revenue, Senior Citizen free transportation, the Shared Ride program, Investment Income, Other Income, Asset Maintenance and Route Guarantees. Also for this purpose, the Commonwealth excludes Depreciation from operating expenses. For Fiscal Year 2006, SEPTA's operating ratio (operating revenue divided by operating expense) is 51.2%.

Exhibit A to Lewis Affidavit at 23 (emphasis added). Thus, SEPTA's own budget classifies senior ride and shared ride subsidies as *operating revenue*. Plaintiff points out that nowhere in his affidavit does Burnfield explain why he classifies senior ride and shared ride programs as state subsidies and SEPTA's own budget specifically classifies them as operating revenue.

> As noted by Plaintiff, Burnfield's classification reduces [SEPTA's] operating ratio (revenue divided by expense) to less than the mandated 50 percent. More specifically, SEPTA's 2006 total budget includes $477.3 million in revenues (which includes senior ride and shared ride subsidies) and $474.5 million in subsidies. By reallocating these funds, which total $70 million, as state subsidies, Burnfield has reapportioned contributions so that subsidies now account for 57.20% of SEPTA's 2006 budget.

Plaintiff's Supplemental Memorandum at 11-12.

SEPTA admits, however, that it can also close its operating deficit by fare raises, service reductions and employee layoffs. Lewis Affidavit, Exhibit 3, p.18, 1.22-p.19 1.7. In addition, according to Exhibit B to the Burnfield Affidavit, for fiscal year 2006, SEPTA received $75,367.00 in local subsidies and $31,200.00 in federal subsidies (the amount increases to $123,300.00 when the $92.1 million in Federal Highway funds are construed as federal, rather than state, subsidies).

There is no doubt that SEPTA receives substantial state funding, whether it be 35%, 44.7% or 52%. Indeed, in Febres, the Third Circuit found that the fact that 85% to 90% of the Board of Education's money came from the state of New Jersey was not enough to trip the state treasury factor in favor of sovereign immunity. SEPTA has not shown, however, that it would be incapable of satisfying a judgment against it and has in fact admitted it can raise additional revenue by fare raises, service reductions and employee layoffs. While the Commonwealth of Pennsylvania *might* ultimately have to provide funds in response to an adverse judgment against SEPTA in this litigation, the key fact is that it would not be legally obligated to do so. Febres, 445 F.3d at 236. "'[V]oluntary payments by a state do not trigger Eleventh Amendment immunity.'" Id. at 234, quoting Christy, 54 F.3d at 1147. Thus, the Court finds that the state treasury factor weighs against finding that SEPTA is an arm of the state.[6]

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[6] SEPTA directs our attention to two cases involving transit operations wherein the respective Court of Appeals found that each was an arm of the State. See Morris v.

Turning to the second factor, SEPTA's legal status under state law, the Third Circuit in Febres stated that four sub-factors are relevant in the analysis: how SEPTA is treated under state law in general, whether SEPTA can sue or be sued in its own right, whether SEPTA is separately incorporated, and whether it is immune from state taxation. Febres 445 F.3d at 230.

The Commonwealth of Pennsylvania has determined that SEPTA "shall in no way be deemed to be an instrumentality of any city or county or other

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Wash.Metro.AreaTransitAuth., 781 F.2d 218 (D.C.Cir. 1986) and Alaska Cargo Transp., Inc. v. Alaska R.R.Corp., 5 F.3d 378 (9th Cir. 1993). In Febres, the Third Circuit distinguished both cases from the situation before it as follows:

> In Morris, immunity was accorded to an interstate transit system. Analysis of both the entity's status under state law and its limited autonomy suggested it was an arm of the two states the transit system served. (Citation omitted). While the states involved were not directly liable, Congressional funding for the system was made contingent upon the states' agreement to meet the system's operating deficits, which could include adverse judgments. And, from the beginning, it was fully anticipated that the entity would have large deficits and thus be continually dependent on the states for its financial survival. (Citation omitted). Alaska Cargo Transport held that the railroad at issue was entitled to immunity as an alter ego of the state, even though the state had expressed liability for it by statute. The case turned on the critical function performed by the railroad in Alaska, and federal laws which essentially required the state to keep the railroad afloat. (Citation omitted).

Since none of the distinguishing facts of Morris (which the Third Circuit in Bolden had the option of following) and Alaska Cargo are present here, this Court, like the Third Circuit in Febres, elects not to follow either decision.

municipality or engaged in the performance of a municipal function, but shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." 74 Pa.Cons.Stat. § 1711(a).[7] SEPTA is separately incorporated and the incorporating statute specifically provides that SEPTA can "sue and be sued." 74 Pa.Cons.Stat. § 1741(a)(2). In addition, since Bolden was decided, the Supreme Court of Pennsylvania has held that SEPTA is not immune for all purposes from state taxation. SEPTA v. Board of Revision of Taxes, 574 Pa. 707, 720, 833 A.2d 710, 717 (Pa.2003).(In its role as a commercial landlord, SEPTA is obligated to pay real estate tax). Given that the Commonwealth treats SEPTA as an agency of the Commonwealth, the Court finds the four subfactors weigh slightly in favor of Eleventh Amendment protection.

With regard to the third factor, degree of autonomy, the Court notes that nothing about SEPTA's autonomy has changed since the Third Circuit's decision in Bolden. The Commonwealth still appoints only five of SEPTA's 15 board of directors. 74 Pa.Cons.Sta. § 1713(a)(1)-(3). SEPTA's agenda is still controlled by its board of directors. Lewis Affidavit, Exhibit 5 at Exhibit B. SEPTA's decisions are still not subject to gubernatorial veto. The Court finds that the third factor weighs against Eleventh Amendment immunity.

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[7] Citing the Third Circuit's decision in Benn, SEPTA argues that once the Court finds that state law treats SEPTA as an agency of the Commonwealth, our analysis need proceed no further. This Court's reading of Benn simply does not support SEPTA's proposition.

In sum, the Fitchik and Bolden decisions remain the law of this Circuit and this Court is bound to follow them. See, Febres, supra. Applying the three-factor test of Fitchik, the Court finds that very little has changed regarding SEPTA's status since the Third Circuit decided Bolden. The state treasury and autonomy factors counsel against Eleventh Amendment immunity for SEPTA while the legal status factor counsels slightly in favor of Eleventh Amendment immunity. As a result, the Court finds that SEPTA has failed to show that it is an arm of the state and therefore subject to immunity under the Eleventh Amendment. Accordingly, SEPTA's motion for summary judgment is denied.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 06-888

[Filed February 12, 2007]

ALLISON COOPER, on behalf of herself and al others similarly situated, c/o Transport Workers Union Local 234	)
v.	)
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	)

ORDER

AND NOW, this day of February, 2007, upon consideration of the Defendant's Motion to Dismiss based on the Eleventh Amendment and all responses and replies thereto, it is hereby ORDERED that:

The motion of the Defendant to dismiss [Doc. #3] is treated as a motion for summary judgment under Fed.R.Civ.P. 56.

The motion of the Defendant for summary judgment [Doc #3] is DENIED.

Pursuant to the consent of Plaintiff, all Plaintiff's state law claims are DISMISSED WITH PREJUDICE.

The Defendant shall file an Answer to the remaining FLSA count in the Complaint within 20 days of the date of this Memorandum Opinion and Order.

BY THE COURT:

/s/Thomas M. Golden

THOMAS M. GOLDEN, J.

No. 08-1085

In The

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

ALLISON COOPER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION ACTUALLY PRESENTED

The question actually presented by this case is whether the 3rd Circuit Court of Appeals correctly found that SEPTA had failed to satisfy its burden of proof in making its claim that it is an "arm of the state" of Pennsylvania and thus entitled to sovereign immunity protection under the Eleventh Amendment of the United States Constitution.

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CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[1]

This Court has taken a broad view of sovereign immunity, interpreting the Eleventh Amendment to bar suits not only against a state but against an entity that acts as an arm or alter ego of a state.[2] Thus, SEPTA raised this constitutional defense of sovereign immunity in response to a claim brought by one of its drivers that SEPTA was violating the Fair Labor Standards Act.[3]

INTRODUCTION

"Only States and arms of the State" possess sovereign immunity under the Eleventh Amendment.[4] In determining whether an entity is an "arm of the

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[1] U.S. Const., amend. XI.

[2] *E.g., Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997); *In re Ayers*, 123 U.S. 443, 487 (1887).

[3] 29 U.S.C. §§ 201-219.

[4] *Northern Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193 (2006).

state" or whether it is "more like a county or city" not entitled to immunity,[5] this Court considers multiple "indicators of immunity or the absence thereof,"[6] including how much control the state has over the entity, whether its implementing legislation considers it a state agency, and whether the state would be liable for a judgment against the entity.[7] The decision below followed this Court's guidance and properly used a multi-factor analysis to conclude that the Southeastern Pennsylvania Transportation Authority (SEPTA) is not an arm of Pennsylvania for Eleventh Amendment purposes.

It is no tautology to observe that a state's interest in Eleventh Amendment immunity cannot be affronted when – as here – the entity is not an arm of the state. This Court has traditionally viewed that issue – to whom sovereign immunity should apply – as fact-based, and weighed factors that were relevant to the entity at issue. The 3rd Circuit conducted the proper analysis. Though SEPTA quarrels with the result, fact-based disputes generally do not justify a grant of certiorari.[8]

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[5] *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

[6] *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

[7] *Id.* at 44-48.

[8] Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law.")

To be sure, SEPTA does not concede that its petition is fact-based. Instead, it manufactures a circuit split where none exists. It also argues for a radical departure of the arm-of-the-state law, urging this Court to treat as dispositive a state's characterization of the entity seeking immunity. This Court has rejected a parallel argument in *Howlett v. Rose,*[9] and its logic cannot be, and is not, distinguished here.

COUNTER-STATEMENT OF THE CASE

A. Facts

This is an "off the clock" overtime case. Plaintiff/respondent Allison Cooper is an adult residing and working within the Eastern District of Pennsylvania judicial district and, during the relevant time period, drove a SEPTA bus. At various times within the 3 years leading up to the commencement of this case, Cooper drove a 40-hour-a-week "swing run," which consists of a morning and an afternoon shift, with a break in between.

SEPTA requires that drivers commence each shift – morning and evening – with a pre-trip inspection. Drivers are required to examine about 20 distinct items, ranging from checking the tire pressure to testing the bus's public address system. These inspections take between 10 to 30 minutes to complete.

[9] 496 U.S. 356 (1990).

In the morning, SEPTA sets aside time for drivers to conduct these inspections, and pays them for this work. In the afternoon, however, SEPTA requires that drivers conduct their pre-trip inspections on their own time. Drivers are "on the clock" the moment their bus leaves the terminal, which means their required afternoon pre-trip inspection is performed "off the clock."

B. Proceedings Below

On Feb. 28, 2006, Cooper sued SEPTA in the Eastern District of Pennsylvania, alleging violations of § 207(a) of the Fair Labor Standards Act, which requires that employees be paid at a rate of time and a half for work in excess of 40 hours per week. Cooper's claim fits easily within conventional FLSA precedent.[10] SEPTA responded by filing a motion to dismiss under Fed. R. Civ. P. 12, asserting it was immune from liability because it was an arm of the state and thus entitled to sovereign immunity

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[10] *E.g., United Transportation Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1118-20 (10th Cir. 1999) ("We therefore hold that the district court, on the undisputed facts of this case, properly granted summary judgment to the drivers on their claim for compensation for time spent traveling on City shuttles to and from relief points at the beginning and end of their split shift periods."); *Hiner v. Penn-Harris-Madison School Corp.*, 256 F. Supp.2d 854, 865 (N.D. Ind. 2003) ("[T]his Court holds that the time spent by Plaintiffs conducting pre and post route bus inspections constitutes working time for purposes of overtime compensation under the FLSA.").

protection. Both SEPTA's opening brief and its reply brief included affidavits containing facts outside the Rule 12 record. Accordingly, after briefing was complete, the District Court granted Cooper's request to conduct limited discovery on the fact issues raised by SEPTA. The District Court further permitted both parties to supplement their briefs and treated SEPTA's motion as one brought under Fed. R. Civ. P. 56.

On Feb. 12, 2007, the District Court denied SEPTA's motion.[11] The starting point for the District Court's analysis was *Bolden v. SEPTA*,[12] the *en banc* 3rd Circuit decision written by then-Judge Alito that held that SEPTA was not an arm of the state and thus ineligible for federal sovereign immunity protection. The District Court rejected SEPTA's principal arguments here: that a change in law and/or a change in its financial condition compelled a different result, holding that "SEPTA has failed to show that it is an arm of the state and therefore subject to immunity under the Eleventh Amendment."[13]

SEPTA appealed. Its argument was heard March 4, 2008, and on November 26, 2008, the 3rd Circuit affirmed. Chief Judge Scirica, writing for a unanimous panel, re-examined SEPTA's status, taking into

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[11] *Cooper v. SEPTA*, 474 F. Supp.2d 720 (E.D. Pa. 2007).

[12] 953 F.2d 807 (3rd Cir. 1991), *en banc*, *cert. denied*, 504 U.S. 943 (1992).

[13] *Cooper*, 474 F. Supp.2d at 727.

consideration the changes in Supreme Court analysis. "Since our decision in *Bolden*, the Supreme Court has refined its Eleventh Amendment jurisprudence. We have followed suit."[14] The 3rd Circuit carefully examined the evolved law, accounting for *Hess v. Port Authority Trans-Hudson Corp.*,[15] *Regents of the University of California v. Doe*,[16] and *Federal Maritime Commission v. South Carolina State Ports Authority*[17] – the same body of law SEPTA now contends required reversal by the 3rd Circuit. And the court got it right, analyzing the facts before it with the twin objectives of protecting the state fisc *and* the state dignity as its guidepost, which exactly conforms with this Court's holdings:

> As set forth in these post-*Bolden* cases, our inquiry into sovereign immunity is not merely a "formalistic question of ultimate financial liability." *Doe*, 519 U.S. at 431.[ ] . . . It has not been reduced to a "non-factor," nor has the status factor become independently "dispositive" of our sovereign immunity inquiry. . . . Our approach is consistent with Supreme Court precedent following *Bolden*. As noted, the Court has stressed the centrality of state dignity to the Eleventh Amendment. But state dignity does not preclude consideration of an entity's financial

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[14] *Cooper v. SEPTA*, 548 F.3d 296, 298-99 (3rd Cir. 2008).

[15] 513 U.S. 30 (1994).

[16] 519 U.S. 425 (1997).

[17] 535 U.S. 743 (2002).

> relationship with the state and its degree of autonomy. *See, e.g., Fed. Maritime Comm'n*, 535 U.S. at 765 [ ] (recognizing that "accord[ing] the States the respect owed them as joint sovereigns" is the "central purpose" of Eleventh Amendment immunity, and that "shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens" is an "important function" served by that doctrine.[ ]) *State dignity encompasses all three factors – we give them equal consideration, and how heavily each factor ultimately weighs in our analysis depends on the facts of the given case.*[18]

The first factor considered by the 3rd Circuit was "[w]hether the money that would pay the judgment would come from the state."[19] The second factor considered SEPTA's status under state law[20] and the third factor considered was SEPTA's autonomy.[21] Finally, the 3rd Circuit balanced the factors and concluded that SEPTA had not demonstrated that it was entitled to Eleventh Amendment immunity protection.[22]

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[18] *Cooper*, 548 F.3d at 302 (emphasis supplied).

[19] *Id.* at 302.

[20] *Id.* at 306.

[21] *Id.* at 308.

[22] *Id.* at 311.

SEPTA complains that this analysis is both "mechanical[ ]"[23] and "formalistic"[24] though it is anything but. The 3rd Circuit followed this Court's teachings by the numbers. SEPTA was given every chance to carry its burden, and it failed.

REASONS FOR DENYING THE PETITION

A. The Petition Should Be Denied Because It Is Premised Upon Misstatements And Exaggerations

The rules of this Court require that petitions for certiorari be brief, clear and accurate, and failure to comply with that standard, alone, is sufficient basis to deny the petition.[25] Respondents, in turn, are "admonished" to point out such inaccuracies to the Court in their opposition to the petition, and not later, or risk the possibility that objections to the inaccuracies are waived.[26]

Here, SEPTA has taken liberties with the nature of the decision below, its own financial status, the state of 3rd Circuit law, its financial autonomy, and the holding upon which its petition relies. These failings justify denial of the petition.

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[23] SEPTA Petition at 9.

[24] SEPTA Petition at 12, 17, 18 and 26.

[25] Sup. Ct. R. 14.4.

[26] *Id.* at 15.2.

1. SEPTA misstates the nature of the 3rd Circuit's holding

SEPTA's misstatements begin on the petition's first page, with its 69-word "question presented." SEPTA's offered question does not concede the fact that 3rd Circuit had before it a denial of a motion for summary judgment. SEPTA's essential failure, according to the 3rd Circuit,[27] was its inability to meet its evidentiary requirements, a problem that should be – but is not – reflected both in SEPTA's presented question and in its petition.

The 3rd Circuit's calibration of the question of whether an entity is an "arm of the state" entitled to Eleventh Amendment immunity – that it is a fact issue on which the entity claiming immunity has the

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[27] *Cooper*, 548 F.3d at 311 ("[I]t is SEPTA's burden to show it is entitled to sovereign immunity. Based on the evidence presented, the Commonwealth's control over SEPTA falls short . . . ") (citation omitted).

burden – is the consensus approach among the circuit courts that have addressed the issue.[28]

2. SEPTA misstates its financial status

In arguing that enough has changed since the *Bolden v. SEPTA*[29] decision to require a different result, SEPTA represents that "the percentage of funding SEPTA received from the Commonwealth had increased from approximately 27% to 52% since 1991."[30] This is neither an accurate comparison nor a meaningful one. As the 3rd Circuit recognized, the

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[28] *R.A. Woods v. Rondout Valley Central School District Bd. of Educ.*, 466 F.3d 232, 237 (2nd Cir. 2006) ("We now join these sister courts in holding that the governmental entity invoking the Eleventh Amendment bears the burden of demonstrating that it qualifies as an arm of the state entitled to share in its immunity."); *Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000) (holding that the state entity "bear[s] the burden of proof in demonstrating that [it] is an arm of the state entitled to Eleventh Amendment immunity."); *Gragg v. Kentucky Cabinet for Workforce Development*, 289 F.3d 958, 963 (6th Cir. 2002) ("[T]he entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity."); *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 734 n.5 (7th Cir. 1994), *superseded in other part by statute*; ("Even if we were to reach the merits of this Eleventh Amendment assertion, we would have to conclude that the [entity] has not begun to meet its burden of persuasion."); *ITSI TV Products, Inc. v. Agricultural Associations*, 3 F.3d 1289, 1292 (9th Cir. 1993) ("[T]he public entity ought to bear the burden of proving the facts that establish its immunity under the Eleventh Amendment.").

[29] 953 F.2d 807 (3rd Cir. 1991) *en banc*, *cert. denied*, 504 U.S. 943 (1992).

[30] SEPTA Petition at 7.

percentage of the funding is no longer critical. "Since [*Regents of the University of California v.*] *Doe*, we have recognized that 'the crux of the state-treasury criterion [is] whether the state treasury is legally responsible for the payment of a judgment against the [entity].' "[31]

Moreover, a fair "apples-to-apples" comparison shows that Pennsylvania's contribution has increased from 27% to 35%, once all of SEPTA's budget reshuffling is accounted for.[32] Thus, SEPTA's complaint that the change in state funding was unaccounted for by the 3rd Circuit is, at best, a red herring.

3. SEPTA misstates the 3rd Circuit's acceptance of Supreme Court precedent

The 3rd Circuit's recognition of evolved sovereign immunity law – as reflected in that court's comments above that the percentage of funding is no longer critical – leads to SEPTA's next misstatement. In discussing the evolved U.S. Supreme Court law concerning sovereign immunity, SEPTA adverts that "[t]he Third Circuit's sovereign immunity jurisprudence has not evolved with similar alacrity."[33] But SEPTA cannot square this critique with the 3rd Circuit's decision in *Benn v. First Judicial District of*

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[31] *Id.* at 303 (quoting *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 233 (3rd Cir. 2006)).

[32] *See Cooper*, 548 F.3d at 303 n.7.

[33] SEPTA Petition at 17.

Pennsylvania,[34] a case unmentioned in SEPTA's petition. In *Benn*, the 3rd Circuit, acknowledging the Supreme Court's holdings in *Doe* and *Federal Maritime*, recalibrated the 3rd Circuit's "arm-of-the-state" test to emphasize the state's dignity interest.[35] The 3rd Circuit concluded that each of the three factors it considers – (1) the source of money that would pay the judgment, (2) the status of the entity under state law, and (3) the degree of autonomy the entity has – must now be considered "co-equals":

> The relegation of financial liability to the status of one factor co-equal with others in the immunity analysis does not mean that it is to be ignored. Like the other two factors . . . it is simply to be considered as an indicator of the relationship between the State and the entity at issue.[36]

Tellingly, SEPTA's complaints concerning 3rd Circuit jurisprudence conflict with its own characterization in its brief *to* the 3rd Circuit, where it conceded that "[t]he Third Circuit also has recognized this [U.S. Supreme Court] change in emphasis."[37]

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[34] 426 F.3d 233 (3rd Cir. 2005).

[35] *Id.* at 239.

[36] *Id.* at 240.

[37] SEPTA App. Br. at 20.

4. SEPTA misstates the degree of its own autonomy

SEPTA also misrepresents its own autonomy where it declares that it was "structured from the start to require governmental subsidiaries to meet its operating deficits."[38] (Cooper assumes that "subsidiaries" is intended to be "subsidies.") SEPTA's own budget destroys this contention. In it, SEPTA makes it clear it has alternatives to state subsidies:

> If this fails, SEPTA will be forced to consider steep fare increases and significant service reductions in order to fund projected budget deficits of nearly $325 million by Fiscal Year 2011.[39]

Cooper has no doubt that this is not SEPTA's preferred solution. But it is a solution, notwithstanding SEPTA's representation here that it cannot solve its operating deficit on its own. In his deposition, SEPTA designee Richard Burnfield confirmed that SEPTA controlled is own fate:

> **Answer [by Burnfield]:** "The action plan could consist of service reductions or fare increases or employee layoffs sometime mid fiscal year."
>
> **Question [by plaintiff's counsel]:** "So there are alternative ways to close the $50.3

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[38] SEPTA Petition at 18.

[39] APP. 00211.

million projected structural operating deficit?"

A: "There are different ways it could be handled, yes."

Q: "That's true every year, isn't it?"

A: "Yes."[40]

5. SEPTA misstates the 3rd Circuit's *Cooper* analysis

And finally, SEPTA fairly dramatically attempts to recast the whole of the 3rd Circuit's *Cooper* analysis, asserting that "the Third Circuit essentially concluded that ultimate legal liability was all that mattered."[41] That is not close to a fair reading of the 3rd Circuit's *Cooper* decision, which considered SEPTA's separate corporate existence,[42] its power to sue and be sued,[43] its power to enter into contracts and make purchases on its own behalf,[44] its enabling statute,[45] its power of eminent domain,[46] its general immunity from state taxation,[47] its status under state

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[40] APP. 00408.

[41] SEPTA Petition at 18.

[42] *Cooper*, 548 F.3d at 307.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

law,[48] its organizational structure,[49] and the effect of two recent Pennsylvania transportation acts.[50]

All of these elements were analyzed under the 3rd Circuit's three-factor arm-of-the-state test, and all were considered against the goal of preserving a state's dignity. The 3rd Circuit explained: "State dignity encompasses all three factors – we give them equal consideration, and how heavily each factor ultimately weighs in our analysis depends on the facts of the given case."[51]

Ultimately, SEPTA's petition is premised on exaggerations and misrepresentations, which is reason enough to deny it.

B. The Petition Should Be Denied Because It Seeks To Radically Change Arm-Of-The-State Analysis

Though it hedges its bet by occasionally qualifying its position, SEPTA's petition seeks not a clarification of "arm-of-the-state" analysis but to radically change the analysis. Relying on such authorities as *Bush v. Gore*[52] (which does not even mention "arm of the state" or "sovereign immunity," much less analyze

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[48] *Id.*

[49] *Id.* at 308-09.

[50] *Id.* at 310.

[51] *Id.* at 302.

[52] 531 U.S. 98 (2000).

the doctrines) and three Pennsylvania state court decisions interpreting *state* law,[53] SEPTA argues that "the pronouncements of Pennsylvania's highest court should have been treated as definitive."[54] The 3rd Circuit's failure to simply defer to Pennsylvania state courts' view of SEPTA status *under state law*, argues SEPTA, "undermin[ed] fundamental principles of sovereignty"[55] and violated the "fundamental teachings" of this Court's jurisprudence that – SEPTA argues – holds the dignity of the sovereign "preeminent."[56]

There are, at minimum, three problems with SEPTA's argument.

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[53] *Jones v. SEPTA*, 565 Pa. 211, 227, 772 A.2d 435, 444 (Pa. 2001) (In personal injury action, complaint "does not satisfy the terms of 42 Pa.C.S. § 8522(b)(4), the Sovereign Immunity Act's real estate exception, and . . . SEPTA is immune from Jones' suit under 42 Pa.C.S. § 8521."); *Tulewicz v. SEPTA*, 529 Pa. 588, 595-96, 606 A.2d 427, 430 (Pa. 1982) (In wrongful death action, "SEPTA is entitled to rely on the limitation of damages cap to the same extent as would the Commonwealth."); *Feingold v. SEPTA*, 512 Pa. 567, 581, 517 A.2d 1270, 1281 (Pa. 1986) (In a wrongful death case, "we conclude that it would be inappropriate to assess punitive damages against SEPTA given its status as a Commonwealth agency.").

[54] SEPTA Petition at 19.

[55] *Id.*

[56] *Id.* at 21.

1. This case is about federal law, not state law

The question of whether a particular state agency is an arm of the state "and therefore 'one of the United States' within the meaning of the Eleventh Amendment is a question of federal law."[57] Thus, SEPTA's reliance on its immune status as against state law personal injury claims does little more than beg the question. It does not advance its cause here.

Moreover, Pennsylvania's sovereign immunity statute is not coextensive with the Eleventh Amendment. The Pennsylvania statute covers entities that were not immune under common law.[58] In contrast, the Eleventh Amendment does not expand common law immunity, but instead protects those entities that were immune from private suit before the ratification of the Constitution.[59] In other words, the protections afforded by the Pennsylvania immunity statute and the Eleventh Amendment are not identical.

So too, Pennsylvania courts recognize that an "agency may be a Commonwealth agency for one purpose and not for another."[60] Where Pennsylvania law recognizes that an entity may be a state agency

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[57] *Regents of the University of California v. Doe*, 519 U.S. 425, 430 n.5 (1997).

[58] *See Toombs v. Manning*, 835 F.2d 453, 459 (3rd Cir. 1987).

[59] *Alden v. Maine*, 527 U.S. 706, 713 (1999).

[60] *James J. Gory Mechanical Contracting, Inc. v. Philadelphia Housing Authority*, 855 A.2d 669, 672 (Pa. 2004).

for some purposes but not all purposes under state law, surely there is no conflict in finding an entity is a state agency for some purposes under state law but not for other purposes under federal law.

2. SEPTA's argument – which asks for a recasting of arm-of-the-state law – has been rejected by this Court

Though SEPTA fails to concede it, this argument, which seeks not to clarify existing law but to change it so that the state's characterization is dispositive – is contrary to law. SEPTA made the same argument to the 3rd Circuit 18 years ago in *Bolden*, which involved wrongful dismissal claims by a former custodian who alleged that his failed drug test that resulted in his termination was unconstitutional. Writing for the majority, then-Judge Alito made hash of the contention:

> SEPTA's position is that the Pennsylvania Sovereign Immunity Act conferred Eleventh Amendment protection upon SEPTA. . . . If this reasoning were accepted, each state legislature apparently could confer Eleventh Amendment protection on any entity it wished, including counties and cities, by enacting a statute clothing these entities with "sovereign immunity" from suit on state claims.[61]

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[61] *Bolden*, 953 F.2d at 817.

In rejecting SEPTA's argument, then-Judge Alito cited this Court's *Howlett v. Rose*[62] decision, which held:

> If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress made on behalf of all the People.[63]

Howlett's logic cannot be distinguished here, and – notably – SEPTA does not even try.

3. SEPTA's argument is premised on a misrepresentation of arm-of-the-state law

SEPTA ties its argument that the state's characterization should be dispositive to its claimed distillation of Supreme Court's sovereign immunity law, which – SEPTA contends, citing *Federal Maritime Commission v. South Carolina State Ports Authority*[64] – has concluded that "the dignity of the sovereign . . . is preeminent."[65] But *Federal Maritime* made clear that vindicating the state dignity interest does not preclude consideration of an entity's

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[62] 496 U.S. 356 (1990).

[63] *Id.* at 383.

[64] 535 U.S. 743 (2002).

[65] SEPTA Petition at 21.

financial relationship with the state, as it acknowledged that "state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens."[66]

C. The Petition Should Be Denied Because There Is No Real Division Among The Circuit Courts

Eleventh Amendment immunity has been sought on behalf of entities as diverse as:

- sheriffs,[67]
- a university,[68]
- a hospital,[69]
- a public broadcasting company,[70]

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[66] *Federal Maritime*, 535 U.S. at 765 (internal quote marks and citation omitted).

[67] *Franklin v. Zaruba*, 150 F.3d 682, 684-86 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999).

[68] *Clay v. Texas Women's University*, 728 F.2d 714, 716 (5th Cir. 1984).

[69] *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61-68 (1st Cir.), *cert. denied*, 540 U.S. 878 (2003).

[70] *Pastrana-Torres v. Corporacion De Puerto Rico*, 460 F.3d 124, 126-28 (1st Cir. 2006).

- a local school board,[71]
- an eye bank,[72]
- a regional jail authority,[73]
- judges,[74]
- a non-profit corporation operating a student union,[75]
- a levee district,[76]
- a regional planning agency,[77]
- a district attorney's office,[78] and
- a transit authority.[79]

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[71] *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279-81 (1977).

[72] *Brotherton v. Cleveland*, 173 F.3d 552, 560-61 (6th Cir. 1999).

[73] *Kitchen v. Upshaw*, 286 F.3d 179, 184-85 (4th Cir. 2002).

[74] *Hyland v. Wonder*, 117 F.3d 405, 413-14 (9th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998).

[75] *Teichgraeber v. Memorial Union Corp. of Emporia State University*, 946 F. Supp. 900, 904-05 (D. Kan. 1996).

[76] *Vogt v. Bd. of Comm'rs*, 294 F.3d 684, 692-96 (5th Cir.), *cert. denied*, 537 U.S. 1088 (2002).

[77] *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979).

[78] *Carter v. City of Philadelphia*, 181 F.3d 339, 348-53 (3rd Cir.), *cert. denied*, 528 U.S. 1005 (1999).

[79] *Jones v. Washington Metro. Area Transit Auth.*, 205 F.3d 428, 432 (D.C. Cir. 2000).

Given the breadth of entities seeking protection as an arm of the state under the Eleventh Amendment, this Court's approach makes sense. Rather than attempt to manufacture a "one size fits all" exhaustive list or precise rule for determining arm-of-the-state status, the Court has applied a balancing test that considers factors that are relevant in light of the nature of the entity at issue. Thus, in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*,[80] this Court concluded that, "[o]n balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the state."[81] This approach – fact-based and focused on issues relevant to the entity seeking immunity – is exactly how the 3rd Circuit considered the issue: "State dignity encompasses all three factors – we give them equal consideration, and how heavily each factor ultimately weighs in our analysis depends on the facts of the given case."[82]

This is not to say that the circuits are left to their own devices. In fact, despite SEPTA's grousing, the overarching inquiry in every circuit is the same: Is the relationship between the state and the entity such that a suit against the entity is effectively an action against the state itself. Indeed, not one of the cases cited by SEPTA suggests that the circuits are

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[80] 429 U.S. 274 (1977).

[81] *Id.* at 280.

[82] *Cooper*, 548 F.3d at 302.

having any difficulty applying this Court's arm-of-the-state analysis.

Cooper has prepared a table demonstrating the uniformity of approach to this issue circuit-by-circuit; it is found in the Appendix. It makes it clear that whatever differences exist among the circuits are not material.

The factors used by *all* the circuits can be broken down into four areas: state control/entity autonomy; structure/status under state law; "governmental" or statewide function; and state funding/financial responsibility/liability. Cooper will discuss (briefly) each of these.

1. State control/entity autonomy

The control of the state over the entity claiming immunity and the entity's autonomy are two sides of the same coin. They are, literally, two ways of saying the same thing. Of the 11 circuits, only the 9th has not explicitly considered this factor.

2. Structure/status under state law

The appendix shows that, of the 11 circuits, only the 7th does not expressly consider the structure/status under state law.

3. "Governmental" or statewide function

Seven of the 11 circuits expressly consider whether the entity performs a "governmental" or statewide function. But the fact that four circuits do not expressly articulate such a factor is, again, an issue of semantics, a point well illustrated by the 3rd Circuit's *Cooper* decision. The 3rd Circuit is one of the four circuits that does not expressly identify this factor in its arm-of-the-state analysis, a point seized upon by SEPTA.[83] But rather than separately consider this factor, the 3rd Circuit included it under its "Structure/status under state law" rubric, citing two Pennsylvania cases for their views that SEPTA "is a local agency and not a Commonwealth agency"[84] whose operations "are not statewide."[85]

4. State funding/financial responsibility/ liability

All 11 circuits expressly consider the issue of state funding/financial responsibility/liability.

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[83] SEPTA Petition at 28-29 ("For example, [some circuits] examine whether the entity's function is primarily local or more central to the state while the Third Circuit does not even consider that factor relevant.") (footnote omitted).

[84] *Fraternal Order of Transit Police v. SEPTA*, 668 A.2d 270, 272 (Pa. Commw. Ct. 1995).

[85] *SEPTA v. Union Switch & Signal, Inc.*, 161 Pa. Cmwlth. 400, 410, 637 A.2d 662, 668 (1994).

Finally, the 5th Circuit and 9th Circuit break out the questions of whether the entity can sue or own property, factors that other circuits consider under the structure/status under state law label.

Without a real conflict, or anything close, to point to, SEPTA's arguments overreach. SEPTA's purported conflict, in the end, is supported by two student publications, one of which is 17 years old, which gave the circuits plenty of time to notice an actual split if one existed. Similarly, it argues that the 3rd Circuit fell out of step with this Court in 2002, with the *Federal Maritime* case, where this Court explicitly recognized that "the preeminent purpose of sovereign immunity is to accord the States the dignity they are entitled to as sovereign."[86] There are two problems with this thesis. First, *Federal Maritime* did not break new ground. More than 100 years earlier, in 1887, this Court observed that "[t]he very object and purpose of the eleventh amendment [was] to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."[87] And second, recognizing the purpose of Eleventh Amendment protection does not address the

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[86] SEPTA Petition at 16.

[87] *In re Ayres*, 123 U.S. 443, 505 (1887). *Cf.. R.A. Woods v. Rondout Valley Central School District Bd. of Educ.*, 466 F.3d 232, 241-42 (2nd Cir. 2006) ("[W]hen the Supreme Court stated in [*Federal Maritime*] that state sovereign immunity's 'central purpose is to accord the States the respect owed as joint sovereigns,' it was merely reiterating a long-established and non-controversial principle.").

question of what entity is entitled to claim that protection.

D. The Petition Should Be Denied Because The 3rd Circuit Got It Right

At bottom, SEPTA's quarrel is not with the 3rd Circuit's approach, but with its conclusion, a complaint that does not warrant this Court's review.[88] But even here, SEPTA's petition fails, as the 3rd Circuit got it right, weighing SEPTA's presentation of evidence against a multi-factor test as set forth by this Court in *Hess*.

There is no question but that the evidence supporting SEPTA's argument was mixed, at best. For example, SEPTA stresses here that its enabling legislation refers to it as a state agency. And yet SEPTA's corporate structure is separate from Pennsylvania.[89] SEPTA can "sue and be sued."[90] SEPTA has the power to enter into contracts and make purchases on its own behalf.[91] SEPTA employees are not employees of Pennsylvania and are not entitled to state employee benefits.[92] SEPTA executives cannot

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[88] Sup. Ct. R. 10.

[89] 74 Pa. Cons. Stat. § 1711.

[90] *Id.* at § 1741(a)(2) and (3).

[91] *Id.* at § 1741(a)(8), (9), (12), (18), (20), (21), (22), (24) and (25).

[92] *Id.* at § 1712.

be employed by the state of Pennsylvania.[93] SEPTA's funds are its own, and the state may not withdraw SEPTA funds for other uses.[94] And unlike traditional state agencies, in certain circumstances SEPTA can be taxed.[95]

"Indicators of local governance"[96] also weigh against characterizing SEPTA as an arm of the state. Two-thirds of SEPTA's 15 board members are appointed by county governments. Of the remainder, four are appointed by the majority and minority leaders of the Pennsylvania state house and senate. Only one is appointed by the governor.[97]

SEPTA's board operates with significant autonomy. It initiates all SEPTA actions and sets all SEPTA policy. The governor cannot veto SEPTA board decisions.[98] The board makes its own by-laws, and only it may modify or repeal them.[99] SEPTA sets its own fares, without state control.[100]

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[93] *Id.*

[94] *Id.* at § 1761(a).

[95] *SEPTA v. Philadelphia Bd. of Revision of Taxes*, 514 Pa. 707, 833 A.2d 710 (Pa. 2003).

[96] *Hess*, 513 U.S. at 44.

[97] 74 Pa. Cons. Stat. § 1712.

[98] *Id.* at §§ 1712-14.

[99] *Id.* at § 1741(a)(5).

[100] *Id.* at § 1741(a)(15).

And finally, it is crystal clear that Pennsylvania cannot be held legally liable for SEPTA's obligations. SEPTA's incorporating statute provides:

> The authority [has] no power, at any time or in any manner, to pledge the credit or taxing power of the Commonwealth or any other government agency, nor shall any of the authority's obligations be deemed to be obligations of the Commonwealth or of any other government agency, nor shall the Commonwealth or any government agency be liable for the payment of principal or interest on such obligations.[101]

In sum, then, SEPTA is not structured such that it is entitled "to enjoy the special constitutional protection of the States themselves."[102] Both the Trial Court and the 3rd Circuit correctly found that SEPTA was not entitled to Eleventh Amendment immunity.

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[101] *Id.* at § 1741(c).

[102] *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

CONCLUSION

The burden was on SEPTA to show that it was entitled to immunity under the Eleventh Amendment, and it failed to satisfy that burden. The rulings below are well in-line with this Court's precedent, and there is no evidence that either the 3rd Circuit – or any other court – has had any difficulty applying that precedent. SEPTA's petition should be denied.

Respectfully submitted,

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Appendix
Arm-of-the-State Factors as Applied by the Circuit Courts

	1st[1]	2d[2]	3d[4]	4th[5]	5th[7]	6th[8]	7th[9]	8th[11]	9th[12]	10th[13]	11th[15]
State control/Entity autonomy	✓	✓[3]	✓	✓	✓	✓	✓[10]	✓		✓	✓
Structure/status under state law	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓
"Governmental" or statewide function?	✓	✓		✓	✓		✓		✓	✓	
State funding/financial responsibility/liability	✓	✓	✓	✓[6]	✓	✓	✓	✓	✓	✓[14]	✓
					Can it sue?				**Can it sue?**		
					Own property?				**Own property?**		

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[1] *See Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61-68 (1st Cir. 2003). The First Circuit evaluates the degree of state control and the functions of the entity as part of its consideration of the entity's status and structure under state law.

[2] *See R.A. Woods v. Rondout Valley Cent. Sch. Dist.*, 466 F.3d 232, 240 (2d Cir. 2006).

[3] The Second Circuit tests state control by looking at how the entity's leaders are appointed and whether the state has a veto over the entity. *See id.*

[4] *See Cooper v. SEPTA*, 548 F.3d. 296, 299-300 (3d Cir. 2008).

[5] *See Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 224 26 (4th Cir. 2001).

[6] The Fourth Circuit analyzes the state's responsibility by looking to whether the suit seeks money from the state. *See id.*

[7] *See Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 596 (5th Cir. 2006). The Fifth Circuit considers the entity's ability to sue and own property in its analysis.

[8] *See S.J. v. Hamilton County*, 374 F.3d 416, 420 (6th Cir. 2004). The Sixth Circuit separately considers the entity's source of funding.

[9] *See Peirick v. Indiana Univ.*, 510 F.3d 681, 695-97 (7th Cir. 2007).

[10] The Seventh Circuit's autonomy inquiry focuses in particular on the financial autonomy of the entity. *See id.*

[11] *See Hadley v. N. Ark. Cmty. Tech. Coll.*, 76 F.3d 1437, 1439-42 (8th Cir. 1996).

[12] *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009 (2004). The Ninth Circuit considers whether the entity has the power to sue and own property as part of its analysis.

[13] *See Steadfast Ins. Co. v. Agricultural Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007).

[14] The Tenth Circuit's approach to state responsibility is to consider the entity's financing and whether it has taxing or bonding authority. *See id.*

[15] *See Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309, 1314 (11th Cir. 2003).

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No. 08-1085

IN THE

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

ALLISON COOPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THERE IS A MATERIAL CONFLICT AMONG THE CIRCUITS IN THEIR APPROACH TO DETERMINING WHETHER AN ENTITY IS AN ARM OF THE STATE.

The circuit courts use a number of different tests, employ a variety of different factors, and disagree as

to which, if any, factor should be weighed most heavily in determining whether an entity is an arm of the state for purposes of the Eleventh Amendment. And when an entity like SEPTA is run through the various circuits' various tests, its status under the Eleventh Amendment varies by circuit. Duel sovereignty, however, is a fundamental feature of our nation's government. Pennsylvania's intent in creating an element of state government and cloaking it with state sovereign immunity should not be entitled to less weight than Massachusetts' intent to do the same.

According to respondent, however, this conflict is of no moment, because, in respondent's view, "the overarching inquiry in every circuit is the same: Is the relationship between the state and the entity such that a suit against the entity is effectively an action against the state itself." Opp. 22. After reframing the question from that lofty vantage, respondent states her view that "not one of the cases cited by SEPTA suggests that the circuits are having any difficulty applying this Court's arm-of-the-state analysis." *Id.* at 22-23.

Respondent is mistaken. As an initial matter, she does not attempt to address in any substantive way the varying tests the circuits currently employ to determine whether an entity is an arm of the state. *See* Pet. 22-27. Rather, respondent reframes the question at such a uselessly general level—"is a suit against the entity * * * effectively an action against

the state itself"?—that all of the pertinent distinctions between the circuits drop away. True, many of the circuits examine factors that overlap; but the point of this petition is that the circuits differ widely, and results differ widely between circuits, depending on the application and the weight accorded to each of those factors. *Id.* Those differences are material.

For example, the First Circuit begins its analysis by asking whether the State structured the entity to share its sovereignty. *See Fresenius Med. Care Cardiovascular Res. Inc.* v. *Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 68 (1st Cir.), *cert. denied*, 540 U.S. 858 (2003). *Only if* the answer to this inquiry is ambiguous does that court go on to consider other factors. *Id.* at 65-68. The First Circuit's approach pays deference to the State's dignity by recognizing the sovereign's interest in structuring elements of its own government. Had the First Circuit's approach held sway in this case, the result would have been different. The Commonwealth of Pennsylvania unambiguously structured SEPTA as a Commonwealth agency entitled to sovereign immunity. *See* 74 Pa.C.S. §§ 1711(a)&(c)(3). And the Pennsylvania Supreme Court explicitly confirmed SEPTA's status. *Feingold* v. *SEPTA*, 517 A.2d 1270, 1276 (Pa. 1986) ("we have no hesitation in concluding that SEPTA was intended to be considered an agency of the Commonwealth"). While the Third Circuit found that SEPTA's status under state law only weighed

"slightly" in favor of immunity, Pet. App. 27a, under the First Circuit's approach, SEPTA would likely be found to be an arm of the state.

Similarly, the varying approaches to, and weight placed on, the "state treasury" factor, when applied to SEPTA, yield different conclusions. The Seventh Circuit, for example, emphasizes the *practical* impact on the state treasury of a judgment; the Third Circuit focused on actual legal liability. Compare *Peirick* v. *Indiana Univ.-Purdue Univ./Indianapolis Athletics Dep't*, 510 F. 3d 681, 695-96 (7th Cir. 2007) with Pet. App. 17a. SEPTA receives hundreds of millions of dollars annually from the Commonwealth—including increased appropriations in each of the last three years to close a structural operating deficit. Pet. 3-5. SEPTA accordingly would likely be considered an arm of the state under the Seventh Circuit's approach. Under the Third Circuit's test, however, SEPTA was not. *See* Pet. App. 17a. Again, the difference in likely results among circuits points up a material difference among the circuits' tests.

Respondent's statement that "not one of the cases cited by SEPTA suggests that the circuits are having any difficulty applying the Court's arm-of-the-state analysis" is similarly puzzling. Opp. 22-23. This Court *itself* recognized in *Hess* the problem this petition identifies:

> The Court wisely recognizes that the six-factor test set forth in *Lake County*, *supra*, ostensibly a balancing scheme, provides meager guidance for lower courts when the factors point in different directions. Without any indication from this Court as to the weight to ascribe particular criteria, the Courts of Appeals have struggled variously adding factors * * * distilling factors * * *, and deeming certain factors dispositive. [*Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 59 (1994) (O'Connor, J., dissenting) (internal citations omitted)].

See Pet. 11, 28 (citing *Hess* for this proposition). And several circuit courts since *Hess* have specifically noted the confusing nature of the arm-of-the-state test. *See Mancuso* v. *New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996) ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused."); *Gray* v. *Laws*, 51 F.3d 426, 431 (4th Cir. 1995) (characterizing *Hess* as "an opinion that is certain to generate confusion"). *See* Pet. 28 (citing to these decisions).

The federal circuits' application of the arm-of-the-state doctrine presently is a baffling stew of factors and subfactors—some invoked more often and more strongly in some circuits than others, some emphasized in some circuits and ignored in others—

that result in an entity being entitled to immunity in some circuits while being denied immunity in others. A more uniform and orderly approach is required to the arm-of-the-state issue. And this case presents an ideal vehicle to devise such an approach.

II. RESPONDENT DISTORTS SEPTA'S POSITION ON THE PROPER APPLICATION OF THE ARM-OF-THE-STATE DOCTRINE.

Respondent suggests that SEPTA is attempting to radically alter the arm-of-the-state analysis by advocating that SEPTA's status under state law should be definitive. Opp. 15-16. From that faulty premise, respondent next contends that this Court's decision in *Howlett* v. *Rose* fatally undermines SEPTA's position. *Id.* at 17-19.

To be clear: SEPTA is not contending, and did not contend in its petition, that *state law determines* whether an entity is entitled to Eleventh Amendment immunity as an arm of the state. *See* Pet. 20 (noting that "Eleventh Amendment immunity is a question of federal law"). Rather, as SEPTA explained in its petition, federal law *looks to state law* in defining the agency's character. *Id.* at 19-20.[1]

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[1] *See Regents of Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 & n.5 (1997) (noting that while Eleventh Amendment immunity is a question of federal law, "that federal question can be answered only after considering the provisions of state law that define the agency's character.")

Where, as here, the State's highest court has recognized that SEPTA is a Commonwealth agency entitled to sovereign immunity, that determination should be definitive as to that factor.

Respondent's contention that SEPTA's argument was rejected in *Howlett* v. *Rose* flows directly from her mistaken premise that SEPTA is seeking to impose state law on a federal question. *Howlett* addressed whether state or federal law applied to defenses to federal claims brought in state courts, and concluded that federal law applied in those circumstances. *See* 496 U.S. 356, 358 (1990). But *Howlett* does not address the issue raised by SEPTA here, *i.e.*, when applying federal law, what deference should a federal court afford determinations of state law by the State's highest court on the character of a state agency? Here, despite multiple specific determinations that SEPTA is a Commonwealth agency entitled to sovereign immunity by Pennsylvania's Supreme Court, the Third Circuit concluded that all of those pronouncements weighed only "slightly" in favor of immunity. Pet. App. 27a. This Court's teachings on federalism and comity dictate otherwise.

SEPTA's status under state law is, put simply, more than "slightly" relevant to the arm-of-the-state determination under federal law. The Third Circuit's test places far too much emphasis on ultimate financial liability while marginalizing the intent of the sovereign and the practical

ramifications of a judgment on the Commonwealth's treasury. Pet. 17-18. The lower court's approach thus ignores this Court's teaching in *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002), that the "preeminent purpose" of the sovereign-immunity inquiry is to protect the state's dignity interest as a sovereign. The state's dignity interest is undermined when federal law gives unduly short shrift to the will of the sovereign in creating and characterizing elements of state government. And the Third Circuit's test similarly runs afoul of this Court's pronouncement in *Hess* that where the factors point in different directions, the court should be guided by the twin reasons for the Eleventh Amendment: protecting against threats to the state's dignity interest as well as the effect of a judgment on the state treasury. 513 U.S. at 47.

III. RESPONDENT'S REMAINING ARGUMENTS ARE BOTH IRRELEVANT AND MERITLESS.

Respondent accuses SEPTA of a series of alleged misstatements and exaggerations that she claims warrant denying the petition. Opp. 8-15. Such contentions are not only irrelevant and distracting from the legal question presented here; they also are meritless.

First, respondent argues that that the Third Circuit's decision arose out of a motion for summary

judgment. Opp. 9-10. SEPTA's motion to dismiss was converted to one for summary judgment because it included materials other than the complaint itself. Pet. 3a. That the legal issue here was resolved on summary judgment is irrelevant; SEPTA is challenging the legal standards the Third Circuit used to assess sovereign immunity. *That* legal issue is a proper question for this Court's intervention; the circuits are in deep conflict about it and are calling for this Court's guidance.

Respondent also takes factual issue with SEPTA's description of its financial status. Opp. 10. Her factual critique is misplaced; and she in any event does not (and cannot) contest that SEPTA receives hundreds of millions of dollars annually from the Commonwealth or that in each of the last three years the Commonwealth was forced to provide additional state monies to close SEPTA's structural operating deficit. These undisputed facts form the foundation of SEPTA's argument with respect to the Commonwealth's practical obligation to SEPTA—and the impact on the Commonwealth's treasury of a judgment against SEPTA. Pet. 16-18.

Respondent similarly argues that SEPTA has understated the degree of its own autonomy. Opp. 13. But the fact that SEPTA can raise fares does not change the fundamental fact that SEPTA was intentionally structured by the Commonwealth to require substantial government resources to fund its operating revenue. Pet. 3-4. In fact, SEPTA is

identical in this respect to the interstate transit system this Court concluded in *Hess* was *entitled* to Eleventh Amendment immunity. 513 U.S. at 49-50.

SEPTA's petition identifies a pure legal issue: the factors to be considered and the weight to accord those factors in determining whether an entity is entitled to sovereign immunity as an arm of the state. The issue is timely, as states across the nation contend with sharply constrained budgets—and sharply heightened demands for state services. The issue has divided the courts, as this Court and others previously have observed. The issue is worthy of this Court's close attention, and certiorari should be granted.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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No. 08-1085

IN THE

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

ALLISON COOPER, *et al.*,

Respondents.

CERTIFICATE OF COMPLIANCE

I, Thomas S. Biemer, a member of the Bar of this Court, hereby certify under Supreme Court Rule 33.1(h) that the reply brief for petitioner on petition for a writ of certiorari contains 1,908 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

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v.

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CERTIFICATE OF SERVICE

I, Thomas S. Biemer, a member of the Bar of this Court, hereby certify that on this 11th day of May, 2009, three copies of a Reply Brief for Petitioner were served by first-class United States mail, postage prepaid, to:

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BY MESSENGER

Honorable William K. Suter
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Re: Southeastern Pennsylvania Transportation Authority v. Allison Cooper, et al., Case No. 08-1085

Dear General Suter:

Enclosed for filing in the above-referenced matter are forty copies of a Reply Brief for Petitioner and the requisite Certificates of Compliance and Service. Also enclosed are extra copies of the Reply Brief and Certificates to be file-stamped and returned.

Thank you for your kind assistance.

Sincerely,

Catherine E. Stetson

Enclosures

cc: All Counsel